

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922

No. 64

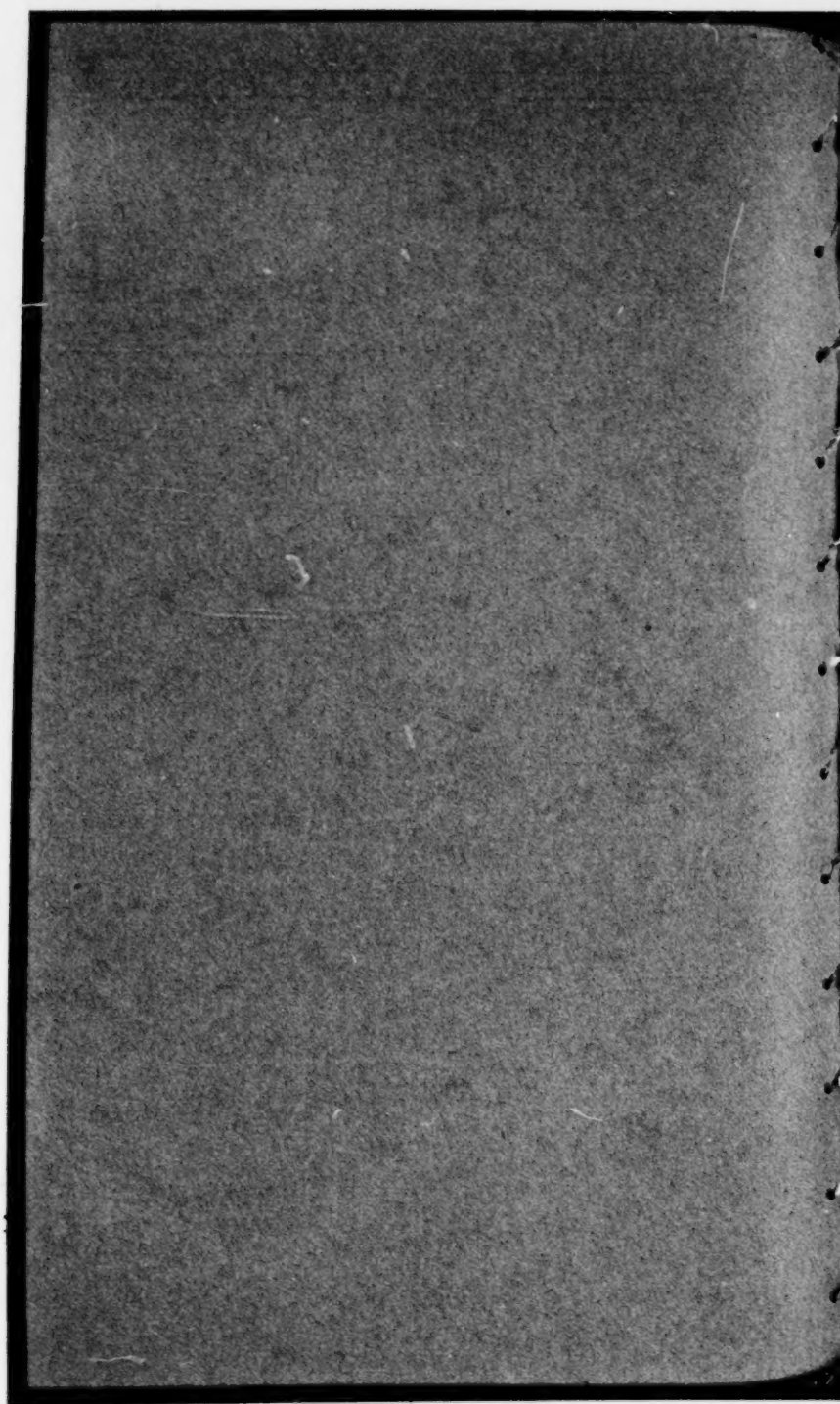
THOMAS F. E. RYAN, APPELLANT,

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS

FILED APRIL 9, 1931.

(38,219)



(28,219)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 292.

THOMAS F. E. RYAN, APPELLANT,

v.s.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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Court of Claims.

No. 33223.

THOMAS F. E. RYAN

VS.

THE UNITED STATES.

I. Petition and Amended Petitions.

On April 13, 1916, the plaintiff filed his original petition.

On July 2, 1919, by leave of court, the plaintiff filed an amended petition.

On April 13, 1920, the plaintiff filed in open court a motion for leave to file amended paragraphs to the amended petition and it was ordered that said motion be submitted. This motion was overruled by the court on April 19, 1920.

On April 24, 1920, the plaintiff filed a motion for leave to file supplemental petition. On May 3, 1920, the court ordered this motion to the files to await trial of case.

On November 11, 1920, before the argument of the case, plaintiff made a motion, in open court, for leave to file an amended and supplemental petition. Said motion was allowed and plaintiff given five (5) days in which to file said petition.

II. Amended and Supplemental Petition.

Filed Nov. 12, 1920.

To the Chief Justice and Judges of the Court of Claims:

The claimant files this amended and supplemental petition, by leave of court granted, to amend and supplement the original petition herein filed April 13, 1916, and respectfully represents and shows:

I. Claimant is a citizen of the United States, residing at 176 E. 108th Street, City and State of New York, and has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government.

II. Claimant is employed in the Customs Service of the United States at the port of New York. On the 16th day of April, 1910, claimant was appointed to the office of day inspector of customs in and for the said port of New York. He took the oath of office for said office on said date, and was paid for his services a compensation of Four (\$4.00) dollars per diem for every day in the year.

2 After said date of April 16th, 1910, down to October 11, 1919, claimant served continuously at said port as said day inspector of customs at Four (\$4.00) dollars per diem, when he was promoted to \$5.00 per diem. He was paid \$4. for every day in each year after said date of April 16, 1910, down to October 11, 1919, when he was promoted to \$5.00 as above stated.

III. Claimant was, and is, at all times hereinbefore and herein-after mentioned, an employee of the Civil Service of the United States, under the Act of Congress of January 16th, 1883, known as the Civil Service Law.

IV. The Acts of Congress of March 2nd, 1799 (1 Stat. 706) and April 26, 1816, (3 Stat. 306), now section 2733 of the Revised Statutes, provided that each inspector of customs should receive Three (\$3.) dollars per diem for each day of service. The Acts of Congress of April 29th, 1864 (13 Stat. 61) and July 23rd, 1866 (14 Stat. 208), now section 2737 of the Revised Statutes, authorized the Secretary of the Treasury to increase the compensation of inspectors of customs in such ports as he might think it advisable to do so, and designate, by adding to the compensation of such officers, a sum not exceeding One (\$1.) dollar per diem. Pursuant to the provisions of the said Act of April 29th, 1864, the Secretary of the Treasury, on June 6th, 1864, increased the compensation of all day inspectors of customs in the port of New York, as well as in other large ports, to Four (4.) dollars per diem.

V. The Act of December 16th, 1902 (32 Stat. 753) authorized the Secretary of the Treasury to increase the compensation of the day inspectors of customs at the port of New York by adding to their compensation of Four (\$4.) dollars per diem, a sum
3 not exceeding One (\$1.) dollar per diem. Pursuant to the provisions of said act, the Secretary of the Treasury, on January 5th, 1903, increased the compensation of all the day inspectors of customs in the said port of New York to Five (\$5.) dollars per diem. All the said day inspectors of customs at the said port of New York continued to receive the compensation of Five (\$5.) dollars per diem, on and after said date of January 5th, 1903, to, and including the 30th day of September, 1905.

VI. On the 1st day of October, 1905, the Secretary of the Treasury reduced the compensation of all the said day inspectors of customs in the said port of New York to Four (\$4.) dollars per diem. All of these day inspectors continued to receive said compensation of Four (\$4.) dollars per diem to and including the 31st day of December, 1905. On the 8th day of January, 1906, the Secretary of the Treasury restored the compensation of Five (\$5.) dollars per diem to all of the day inspectors at the port of New York, effective January 1st, 1906.

VII. This aforesaid reduction in compensation during the said months of October, November and December, 1905, was brought to the attention of Congress, and that body passed a law known as

the Act of June 30th, 1906, (34 Stat. 634)), appropriating Thirty-one thousand (\$31,000) dollars, or so much thereof as might be necessary to pay the inspectors of customs at the port of New York, the difference between the per diem salary of Four (\$4.) dollars paid them during the said three months of October, November and December, 1905, and their proper per diem salary for the same period (Five (\$5.) dollars per diem), in accordance with the Act of Congress of December 16th, 1902 (32 Stat. 753).

VIII. The Congress passed a further law, known as the Act of March 4th, 1907 (34 Stat. 1373) appropriating the sum of Nine Hundred Forty (\$940.) dollars additional, to enable the Secretary of the Treasury to pay certain other inspectors of customs at the port of New York the difference between the per diem salary of Four (\$4.) dollars paid them during the said months of October, November and December, 1905, and their proper per diem salary of Five (\$5.) dollars for the same period.

IX. The Act of March 4th, 1909 (35 Stat. 1065) authorized the Secretary of the Treasury to increase and fix the compensation of inspectors of customs, as he might think advisable, not to exceed the rate of Six (\$6.) dollars per diem. This act provided further, that in all cases where the maximum compensation was paid, no allowance should be made for meals or other expenses incurred by inspectors, when they were required to work at unusual hours.

X. Claimant was not paid for his services as day inspector of customs, more than Four (\$4.) dollars per diem from the time he was appointed to said office on April 16th, 1910 until October 1, 1919, as averred in paragraph II herein. Claimant avers that the said Act of March 4th, 1909 (35 Stat. 1065), and the acts prior thereto, conferred no authority upon the Secretary of the Treasury to appoint claimant at the compensation of Four (\$4.) dollars per diem. Claimant further avers that he should have been appointed at the compensation of Five (\$5.) dollars per diem on April 16th, 1910, as that was the lawful and fixed compensation of the office of inspector of customs in the port of New York.

XI. By virtue of the provisions of Chapter 355 of the Act of 1912, approved August 24, 1912, the President was authorized and empowered to reorganize the customs service so as to bring the total expense thereof within a sum not exceeding Ten Millions One Hundred Fifty Thousand (\$10,150,000) dollars. That, pursuant thereto, the President under date of March 3, 1913, issued an executive order effecting a reorganization of the customs service. The said executive order became effective July 1, 1913.

Annexed to said order was a detailed estimate of the expenses of the customs service under reorganization therein provided for. The executive order did not fix the salaries of any of the officers of the customs service other than collectors of customs. The act of Congress authorizing the reorganization of the customs service limited the President to an expense not exceeding Ten Million One Hundred

Fifty Thousand (\$10,150,000) dollars. The estimate annexed to the said order contemplated an expenditure of Ten Million Six Hundred Eighty One Thousand, Seven Hundred Sixty Six and 01/100 (\$10,681,766.01) dollars, a sum greatly in excess of the limitational amount specified in the said Act of August 24, 1912. Claimant avers that the aforesaid estimate was not, and was not intended to be, a part of the executive order and it did not, and was not intended to, fix the permanent organization of the customs service.

6 Claimant further avers that the Treasury Department, ever since the said executive order became effective, has at all times held and construed the said estimate, and now holds and construes the same to be an estimate only, and that the said Department has, at all times since the said executive order became effective governed itself and acted upon the theory of fact and law that such estimate was an estimate only and in no sense a restriction, limitation or denial of the right and power of the Department to increase or decrease the numbers of the various positions therein provided for, or to increase or decrease the compensation of any of the officers therein mentioned. Furthermore, the said Treasury Department has always regarded and construed the said estimate as being subject to change at the discretion of the Secretary of the Treasury, and claimant avers that the said estimate has been totally disregarded by the Treasury Department in making promotions and in creating additional or different officers. Claimant avers that in the district of New York mentioned in said estimate, innumerable promotions have been made without further legislation by Congress, and that various positions and the salaries thereto attached, as set forth in the said estimate for the district of New York, have been frequently and substantially changed by Departmental action without further legislative action.

Claimant further avers that said estimate made no provision for clerks, deputy collectors or other persons at a salary, or salaries, of \$4,000 per annum in the office of the Collector at the port of New York, yet at least two clerks or deputy collectors in said office are now, and have been for several years, receiving \$4,000 per annum without further legislative action.

7 Claimant further avers that the salary of the Cashier in the Collector's office at the port of New York was stated at \$5,000 per annum in said estimate, but that said salary has been reduced to \$4,000 per annum by the Treasury Department without further legislative action.

Claimant further avers that many additional employees, inspectors, clerks and others, for whom no provision was made in said estimate, have been and are now being employed in said port and district of New York, without further legislative action.

Claimant further avers that many positions provided for in said estimate for the port and district of New York have been abolished by the Treasury Department, including the 9 "clerks and acting weighers" therein mentioned, without further legislative action.

That by reason of the foregoing, the said estimate did not fix the permanent organization of the customs service nor did it fix the salaries of any of the employees therein mentioned.

Claimant therefore avers that the said executive order did not effect the salary of the office of inspector of customs in any way, and that the salary of said office in the port of New York was fixed by law at Five (\$5) dollars per diem prior to March 4, 1909, and that the Act of March 4, 1909, did not disturb said fixed rate but merely authorized an increase thereof to a maximum of Six (\$6) dollars per diem.

XII. Claimant was, and is entitled to compensation for the services rendered by him in the following amounts over and above what he received therefor:

One (\$1) per diem from April 16, 1910, to and including October 10, 1919, 3,465 days, amounting to Three Thousand Four Hundred Sixty Five (\$3,465) dollars; The only action that has been taken on this claim in the Departments or in the Congress of the United States is that set forth in this petition.

XIII. Claimant is the sole owner of this claim, no other person, or corporation is interested therein, and no assignment or transfer of the claim, or any part thereof, or interest therein, has been made.

XIV. Claimant is justly entitled to the amounts herein named from the United States, as he is advised and believes, after allowing all just credits and set-offs.

Wherefore, He Prays judgment against the United States for the sum of Three Thousand Four Hundred Sixty Five (\$3,465) dollars.

SPOOR & RUSSELL,
Attorneys of Record.

DUDLEY & MICHENER,
Of Counsel.

DISTRICT OF COLUMBIA, ss:

Personally appeared before me, a Notary Public, in and for the District of Columbia, William E. Russell, who, being sworn according to law, deposes and says:

That he is a member of the partnership of Spoor & Russell, attorneys at law, which partnership has been duly authorized by Power of Attorney, to represent the claimant and verify pleadings in this case; that he has read and understands the foregoing petition, and that the matters and things therein stated, are true, in substance and in fact, as he is informed and believes.

WILLIAM E. RUSSELL.

Subscribed and sworn to before me this 12th day of November, 1912.

[SEAL.]

INEZ T. WALDEN,
Notary Public, D. C.

III. *General Traverse.*

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

IV. *History of Proceedings.*

On November 11, 1920 this case was argued and submitted on merits.

On December 13, 1920, the court handed down the following order:

Order.

The court deeming it necessary to call for additional facts has made a call on its own motion, and the answers thereto are on file. The cause is now remanded to the Calender for re-argument to the end that the court may have the benefit of the views of the respective parties as to whether the answers to the court's call affect the case.

The case will be set for hearing in January, 1921, at the convenience of counsel.

By THE COURT.

V. *Argument and Submission of Case.*

On January 11, 1921, this case was argued and submitted on the order of remand by Mr. William E. Russel, for the plaintiff, and Mr. Willard D. Harris, for the defendant.

10 VI. *Findings of Fact, Conclusions of Law, and Opinion of the Court by Downey, J.*

Entered February 21, 1921.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

Plaintiff is a citizen of the United States and of the State of New York and has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

II.

The plaintiff, Thomas F. E. Ryan, is employed in the Customs Service of the United States. He entered the service as a probation-

ary junior clerk, class C, on April 13, 1899, having first taken and passed a civil service examination for said position. On June 12, 1900, as a result of a promotion examination, he was promoted to clerk, class E, salary \$1,000. He was transferred without examination to the position of night inspector at \$3 per diem on January 11, 1904. On January 29, 1909, he was promoted after a first-grade promotion examination to clerk, class 1, salary \$1,200. On April 9, 1910, effective from date of execution of oath, he was promoted to inspector at \$4 per diem (class 2), as a result of a promotion examination. This appointment was made by virtue of a letter of the Secretary of the Treasury to the Collector of Customs at the port of New York, dated April 9, 1910, reading as follows:

"As recommended in your letter of the 7th instant, the following-named persons are hereby appointed inspectors, class 2, new offices, with compensation at the rate of four dollars (\$4) per diem, each, to take effect from date of new oath. This will result in an increase of \$4,380 per annum in the expenses of your district:

"Thomas F. E. Ryan, now clerk, class 1, at \$1,200 per annum.

"Ernest Lockwood, now clerk, class 1, in the office of the appraiser of merchandise, at \$1,200 per annum.

11 "James E. Davis, now sugar sampler, class 1, in the office of the appraiser of merchandise, at \$1,350 per annum."

Claimant executed the oath on April 16, 1910, reciting therein that—

"I, Thomas F. E. Ryan, having been appointed inspector, class 2, collector's office, port and district of New York, do solemnly swear, etc."

On October 9, 1919, effective from date of execution of oath, he was promoted to inspector, \$5 per diem, no examination being required, and executed the oath on October 10, 1919. Effective July 1, 1920, he was by letter of August 25, 1920, promoted to inspector, \$5.50 per diem.

III.

From April 16, 1910, until October 10, 1919, he was paid at the rate of \$4 per diem and at said rate was paid in all the sum of \$13,860 in addition to which during said period he was paid \$2,428 as additional compensation under the act of February 13, 1911. Aside from such additional compensation he was at no time paid more than \$4 per diem until his promotion, October 11, 1919, to inspector, \$5 per diem.

IV.

Pursuant to the provisions of the act of April 29, 1864 (13 Stat. 61), the Secretary of the Treasury, on June 6, 1864, increased the compensation of all inspectors of customs in the port of New York, and in other large ports, from \$3 per diem to \$4 per diem.

V.

The Secretary of the Treasury, on January 5, 1903, by an official order of that date, approved a recommendation of the collector of customs at New York for the employment from date of new oath "as inspectors of customs, class 4, new offices, with compensation at the rate of five dollars (\$5) per diem each" of "the inspectors of customs, class 2, hereinafter named, with compensation at the rate of four dollars (\$4) per diem each," and that the positions as inspectors of customs, class 2, thus vacated, be abolished. The order set out the name of each such employee with the serial number theretofore borne by him and designated his new serial number under the new appointment.

Under date of October 2, 1905, the Secretary of the Treasury addressed to the collector of customs at New York an order as follows:

"SIR:

Referring to the decision of the Comptroller of the Treasury, dated February 14, 1905, to your letter of the 22d instant, and confirmatory of department telegram of the 30th ultimo, the employment from date of new oath, to take effect October 1, 1905, of the inspectors, class 4, hereinafter named, with compensation at the rate of five dollars (\$5) per diem each, as inspectors, class 2, new office, with compensation at the rate of four dollars (\$4) per diem each, is hereby approved and the positions thus vacated are abolished.

12 "Referring further to department letter of the 28th ultimo, you will allow one dollar (\$1) per diem additional, as authorized by the act of December 16, 1902, the inspectors for each day when services are rendered by them at unusual hours for which no compensation is otherwise allowed."

A list of 331 names with serial numbers followed, and also 50 names, without serial numbers, under the subhead "Temporary inspectors."

These inspectors were paid a per diem compensation of \$4 from October 1 to December 31, 1905, inclusive. It is not shown how many of them received the additional \$1 per day for service at unusual hours or in what amount.

On January 8, 1906, the Secretary of the Treasury directed to the collector of customs at New York an order as follows:

"SIR:

As recommended in your letter of the 5th instant, the employment from date of new oath, of the inspectors, class 2 hereinafter named as inspectors, class 4, new offices, with compensation at the rate of five dollars (\$5) per diem each, is hereby approved, the increase in compensation to take effect January 1, 1906, and the positions thus vacated to be abolished."

followed by 331 names with serial numbers and four "temporary inspectors."

VI.

Immediately prior to the time of plaintiff's appointment as an inspector of customs at the port of New York, class 2, at a salary of \$4 per diem, and continuously since the order of January 5, 1903, recited above, except for the months of October, November, and December, 1905, all inspectors of customs at the port of New York received \$5 per diem as compensation for their services, and by virtue of provisions in the deficiency acts of June 30, 1906, and March 4, 1907, compensations for those three months were adjusted on that basis. On April 9, 1910, the Secretary of the Treasury authorized the appointment of three inspectors of customs, class 2, new offices, at a compensation of \$4 per diem, as set out in Finding II. From April 16, 1910, until June 30, 1910, 25 inspectors of customs at the port of New York were appointed, class 2, \$4 per diem.

At some time, not definitely shown, after the passage of the act of March 4, 1909, Collector Loeb at the port of New York determined upon a reorganization of the customs service at that port and took steps to that end. The reorganization finally agreed upon recommended three grades for inspectors, namely, class 2, with compensation at the rate of \$4 per diem each; class 4, with compensation at the rate of \$5 per diem each; and class 5, with compensation at the rate of \$6 per diem each; and that class 2 be subdivided into class 2 junior and class 2 senior and class 4 similarly subdivided into class 4 junior and class 4 senior; and that class 2 junior, with compensation at the rate of \$4 per diem, should be the entrance grade to the position of inspector of customs. The duties of the various grades were provided, provision made with reference to promotions and other matters not necessary to recite. A committee was appointed by the collector, which was instructed to sit as an examining board and to call before it for examination each inspector then in the service, examine him upon all points touching his qualifications
13 and efficiency and recommend the grade to which he should be appointed. In reporting to the Secretary of the Treasury for his approval or otherwise the proposed plan of reorganization, the collector of customs, referring to the desirability of a classification of inspectors based upon length of service, qualification, and efficiency, said:

"It is a generally recognized fact in the employment of men, whether in public or private service, that they will work with much more zeal and energy if there is an opportunity for their efficiency to be recognized by promotion in salary and rank, and in the establishment of these three classes a young man who enters the service at the lowest grade can look forward, if he performs satisfactory service, to advancement to five and eventually six dollars per diem. This grading also gives due recognition to experience as well as ability. I believe that five dollars per diem is too liberal a salary

for a young man just entering the inspectors' corps, without any particular knowledge of customs or experience in the duties of inspector. Under this method the good men will naturally advance to the highest rate of pay, and provision is made for difference in pay for the different capacities of inspectors. Under the old method of giving all inspectors five dollars per diem no allowance was made for the varying capacities of the men in the force, and therefore little incentive existed for performance of the highest grade of work.

"Before taking steps for the reorganization of this force, I conferred personally with the honorable Secretary of the Treasury, and upon receiving his verbal approval, as a preliminary step, I appointed a committee consisting of Mr. F. A. Collins, private secretary to the collector; Mr. Laurence J. Maher, appointment clerk; Dr. C. F. Longfellow, physician, civil service board; Mr. Alexander McKeon, deputy surveyor; Mr. John J. Raczkiewicz, acting deputy surveyor (chairman); and instructed the members to sit as an examining board and call before it each inspector of customs, taking into consideration his age, physical condition, length of service, efficiency, character, and qualifications, and grade him according to this test, and to submit a report and recommendations based on this examination. This the committee has now done and I beg to submit the same herewith with my approval.

"I have gone over, personally, the plan submitted and the reports on the men, and I am very much gratified with the work which the committee has performed, and believe they have executed the task assigned to them in a conscientious and painstaking manner, with a just regard for the best interests of the service and of the individual men involved."

The recommendation of the collector with reference to the reorganization was approved by the Secretary of the Treasury and pursuant thereto 74 inspectors were appointed to class 2, at \$4 per diem, 296 to class 4, at \$5 per diem and 52 to class 5, at \$6 per diem. Some time thereafter four inspectors were promoted from the \$5 to the \$5.50 per diem class and still later three inspectors, for recognition of valuable services, were promoted from the \$4 to the \$4.50 class. The reorganization thus provided for was effective as to the whole force from July 1, 1910. The appointment of the plaintiff and others in April, 1910, as inspectors, class 2, \$4 per diem, 14 marked their entrance into this service and they were not reappointed under the reorganization but remained inspectors, class 2, under their original appointments.

VII.

The reorganization of the customs service at New York, referred to in the next preceding finding, was continued after the reorganization of the customs service by the President had under authority of the act of August 24, 1912 (37 Stat. 434), and the Executive order of March 3, 1913, effective July 1, 1913, issued pursuant to said act.

VIII.

Attached to the Executive order dated March 3, 1913, effective July 1, 1913, reorganizing the customs service under the authority of the act of August 24, 1912 (37 Stat. 434), was a detailed statement by districts of the estimated expenses for salaries of the customs services under the reorganization. The Treasury Department has at all times since the said Executive order became effective construed said statement as an estimate only and not as a restriction, limitation, or denial of the right to increase or diminish the numbers of the various positions therein provided for or to increase or decrease by promotion or demotion the compensation within statutory limits of any of the offices therein mentioned.

IX.

The Treasury Department during all the period involved herein and prior thereto construed the various acts with reference to the salaries of inspectors of customs as authorizing a classification thereof. It so construed the act of March 4, 1909, and thereunder they were classified as hereinbefore stated. It also so construed the law under the reorganization by the President pursuant to the act of August 24, 1912.

X.

The position of inspector of customs at the port of New York is and has been by the Secretary of the Treasury and by the Civil Service Commission held to be covered by the civil service act of January 16, 1883 (22 Stat., 405), from the time that said act became effective, and promotions, appointments, and transfers have been made pursuant to the regulations and rules promulgated pursuant to said act.

XI.

From and since January 16, 1883, there have at all times been employed in the customs district of New York as many as 50 or more employees.

XII.

The original petition in this case was filed April 13, 1916, and made demand for additional compensation at \$1 per diem from April 16, 1910, to and including June 30, 1910, and at \$2 per diem from July 1, 1910, to and including April 10, 1916. An amended petition was filed July 2, 1919, in which the demand at \$1 per diem for the entire period was brought down to June 30, 1919. The second amended and supplemental petition upon which the case is submitted was filed November 12, 1920.

Subsequent to his appointment and his acceptance thereof on April 16, 1910, the claimant was regularly paid at \$4 per diem, and it does not appear that he at any time made any objection or protest as to

the amount of his compensation. It does not appear that he made any demand for other or greater compensation than that paid him until and by the filing of his original petition herein on April 13, 1916.

Conclusion of Law.

On the facts found the court concludes as matter of law that the plaintiff is not entitled to recover and that his petition ought to be and it is dismissed with judgment against him for cost of printing the record herein to be ascertained and taxed by the clerk.

Opinion.

DOWNEY, *Judge*, delivered the opinion of the court:

The plaintiff was, during the period here involved and still is, an inspector of customs at the port of New York. After considerable service in minor capacities, in all of which his appointment followed a proper civil-service examination, he was on April 16, 1910, after a promotion examination, appointed inspector, class 2, new office, with compensation at the rate of \$4 per diem, and was paid at that rate until his promotion to inspector, \$5 per diem, on October 10, 1919. By his original petition filed April 13, 1916, plaintiff demanded judgment for additional compensation as an inspector of customs at the port of New York at the rate of \$1 per day from April 16, 1910, to and including June 30, 1910, 76 days, amounting to \$76, and at the rate of \$2 per day from July 1, 1910, to and including April 10, 1916, 2,111 days, amounting to \$4,222, in all the sum of \$4,298. By an amended petition filed July 2, 1919, he demanded additional compensation at the rate of \$1 per day for 3,363 days from April 16, 1910, to June 30, 1919, amounting to \$3,363. By a second amended and supplemental petition filed November 12, 1920, upon which the case is submitted, the demand is for \$3,465, at \$1 per diem for the period from April 16, 1910, to and including October 10, 1919. During all of said period he had been paid at the rate of \$4 per diem, and now contends that he was entitled to have been paid at the rate of \$5 per diem. On October 9, 1919, he was promoted to inspector of customs at \$5 per diem, and has since been paid at that rate.

The importance of this case is not measured alone by the amount involved so far as this particular plaintiff is concerned, for it is apparent from the record that quite a large number of other cases may depend upon the conclusions reached here, and we may therefore, in this fact, find justification for a somewhat extended discussion.

16 Consideration of the case must necessarily involve a review of a number of statutes and some other matters with reference to the organization and conduct of the customs service and this may perhaps best be done before going to questions of construction and application. The review will be made as brief as possible.

By the act of July 31, 1789 (1 Stat. 45), and the act of March 3, 1797 (1 Stat. 503), the compensation of inspectors was fixed, re-

spectively, at sums not exceeding \$1.25 and \$2 per day. By the act of March 2, 1799 (1 Stat. 704), fixing the compensation of customs officers the compensation of inspectors was fixed at "a sum not exceeding two dollars" per diem, and by the act of April 26, 1816 (3 Stat. 306), there was allowed "an addition of 50 per cent upon the sum allowed" by the last preceding act.

The act of April 29, 1864 (13 Stat. 61), authorized the Secretary of the Treasury to increase the compensation of inspectors "in such ports as he may think it advisable so to do, and may designate, by adding to the present compensation of said officers, a sum not exceeding one dollar per day," the increase not to extend beyond July 1, 1865. The act of March 2, 1865 (13 Stat. 460), extended the provisions of this act to July 1, 1866, and the act of July 23, 1866 (14 Stat. 208), continued it without limitation. Following these acts section 2733 of the Revised Statutes provided that each inspector should receive for each day actually employed \$3 and section 2737 authorized the Secretary of the Treasury to increase the compensation of inspectors by a sum not exceeding \$1 per day in such ports as he might think it advisable and may designate.

By the act of March 3, 1881 (21 Stat. 429), it was provided that hereafter the Secretary of the Treasury may appoint inspectors of customs at a compensation less than \$3 per day when in his judgment the public service would permit.

By the act of December 16, 1902 (32 Stat. 753), the Secretary of the Treasury was authorized to increase the compensation of inspectors of customs at the port of New York as he might think advisable and proper by adding to their then compensation a sum not exceeding \$1 per day, such additional compensation to be for work performed at unusual hours for which no compensation was then allowed and as reimbursement of expenses for meals and transportation while in the performance of official duties.

The deficiency act of June 30, 1906 (34 Stat. 636), appropriated \$31,000 or so much thereof as might be necessary to pay inspectors of customs of the port of New York "the difference between the per diem salary of \$4 paid them during the months of October, November and December, 1905, and their proper per diem salary for the same period (\$5 per diem) in accordance with the act of Congress, approved December 16, 1902," and by the act of March 4, 1907 (34 Stat. 1373), \$940 was appropriated to enable the Secretary of the Treasury "to pay certain inspectors of customs of the port of New York the difference between the per diem salary of \$4 paid them during the months of October, November, and December, 1905, and their proper per diem salary of \$5 for the same period."

By the act of March 4, 1909 (35 Stat. 1065), the Secretary of the Treasury was authorized "to increase and fix the compensation of inspectors of customs as he might think advisable not to exceed
17 in any case the rate of \$6 per diem and in all cases where the maximum compensation is paid no allowance shall be made for meals and other expenses incurred by inspectors when required to work at unusual hours."

The act of August 24, 1912 (37 Stat. 434), directed the President to effect a reorganization of the customs service and report the same

to Congress, the reorganization to become effective for the fiscal year 1914 beginning July 1, 1913, and to remain in force until otherwise provided by Congress. The reorganization thus directed was reported to Congress on March 3, 1913, and may be found in Volume VI. Compiled Statutes of 1916, beginning at page 6513.

Since the chief reliance of plaintiff's counsel seems to be upon the Cochnower case, 248 U. S., 405, and 249 U. S., 588, it is well to determine in the first instance whether the facts in the two cases are in effect the same or whether any material difference appears. Cochnower, having theretofore served in various capacities and at various salaries and then being "Storekeeper No. 13, class 2," was on June 16, 1908, effective from date of new oath, appointed "as inspector No. 228, class 4, with compensation at the rate of \$5 per diem," in which position and at which rate he served until July 1, 1910, when, by virtue of an order appointing him as inspector, class 2, \$4 per diem, his compensation was reduced to that amount. It is said in the opinion that the plaintiff's petition showed that he was appointed on June 13, 1908, an inspector at \$5 per diem and served at that rate until July 1, 1910, "when he was reduced to \$4 per diem" and the case is treated as one involving simply a reduction of salary and it is turned largely upon the construction of section 2 of the act of March 4, 1909, particularly upon the construction of the words "increase and fix" used therein. It was, of course, not questioned that the statute authorized the Secretary of the Treasury within the stated limits to "increase" the compensation of inspectors and that it also authorized him to "fix" such compensation. But it was held contrary to the construction of this court that the language did not authorize a reduction in compensation. Cochnower had been appointed before the passage of the act of March 4, 1909, at a time when all inspectors of customs were being paid \$5 per day and the action of the Secretary of the Treasury as complained of served to work a reduction in his compensation. The plaintiff in this case was appointed subsequent to the passage of that act. He was specifically appointed as inspector, class 2, new office, at \$4 per day and has suffered no reduction from that salary.

The stated difference between the two cases seems to us a material one, and while referring to the Cochnower case there are other features which it may be as well to mention here. The claim as presented in the Cochnower case was for \$2 per day, the difference between the reduced pay of \$4 per day and a claimed pay of \$6 per day. The judgment directed by the Supreme Court was for \$1 per day, the difference between the reduced pay of \$4 per day and a determined legal pay of \$5 per day, the additional \$1 per day being rejected. It is also to be observed that the judgment directed was for the period from July 1, 1910, the date of the reduction, to June 30, 1913, inclusive, the last day before the taking effect of the reorganization of the customs service by the President as directed by the act of August 24, 1912. While it was held in the Cochnower case that the Secretary of the Treasury had no right to reduce Cochnower's compensation from \$5 to \$4 per day, the holding was apparently upon the theory that the statutory compensation of an inspector was \$5 per day, which the Secretary had no right to reduce.

There is to our minds another feature of that case which, if presented to the Supreme Court, a fact as to which we are not informed, was evidently not presented as it occurs to us, and upon that theory is not discussed. We do not mention it here because of any disposition to take issue with anything said in the Cochnower case, but because of its bearing upon the instant case and perhaps more strongly than upon the Cochnower case.

It appears from the findings in this case that from April 16, 1910, subsequent to the passage of the act of 1909, to June 30, 1910, 25 inspectors of customs, of which this plaintiff was one, were appointed at the port of New York, inspectors, class 2, new offices, at a compensation of \$4 per diem, and that upon July 1, 1910, there became effective a reorganization of the customs service under which inspectors were classified in three classes at, respectively, \$4, \$5, and \$6 per diem, 74 being assigned to the \$4 class, 296 to the \$5 class, and 52 to the \$6 class, and that the assignments to such classes were the result of a grading and classification and not because of any extra service performed or any work required outside of usual hours. The details of this reorganization are more fully set out in the findings. The Secretary of the Treasury and the collector of customs had construed the act of March 4, 1909, as authorizing a classification of the service, and upon July 1, 1910, when it is said that Cochnower's salary was reduced from \$5 to \$4 per day, this classification was in effect. The change in Cochnower's salary from \$5 to \$4 per day is treated as a reduction of a statutory salary and upon that basis may be conceded to have been unauthorized. In referring briefly to this feature of the situation it is said in the opinion of the court in the Cochnower case that—

"It is, however, urged that the act implies minimum and maximum salaries especially of inspectors and also the power of classification of inspectors. We are not called upon to dispute it. The effect or the power does not enlarge the authority to increase salaries into an authority to decrease them. The power given can otherwise be accommodated."

It seems to us that the change in Cochnower's salary from \$5 to \$4 per diem is not under the circumstances to be regarded as a decrease in a statutory salary but rather a demotion in a classified service. If there was authority under that act to classify the inspectors at the port of New York and create classes, respectively, at \$4, \$5, and \$6 per day, there must have been in the appointing power authority to demote from the \$5 to the \$4 class, and if there was a demotion in a classified service it was not a reduction in a statutory salary. This leads necessarily to the question of whether under the act of March 4, 1909, a classification was authorized.

As bearing upon this question there is first for consideration the construction put upon the act by the Secretary of the Treasury, whose duty it was to administer it. He construed the act as permissive and as authorizing a classification of inspectors, not a new theory but in line with that prevailing under former acts, although somewhat differently applied. There is next for consideration

the conclusion which it seems to us must be drawn from the action of the Supreme Court in the Cochnower case taken in connection with the demands of the plaintiff. The plaintiff did not sue alone to recover the difference between the salary paid him after July 1, 1910, and the salary he was theretofore receiving, but he sought to recover the difference between the salary paid him after July 1, 1910, and the maximum of \$6 per diem authorized by this act, upon the theory clearly that the act fixed the statutory compensation of inspectors at \$6 per diem. This contention was not sustained by the Supreme Court, and since it is clearly apparent from the act itself that it authorized a maximum salary of \$6 per diem it must be concluded that the act was by the Supreme Court regarded as permissive in its character. Indeed the language of the act itself clearly indicates that a graduation in salaries was contemplated, for under its language there must necessarily follow a difference in compensation unless the service of all inspectors was the same and all were to receive the maximum salary. But the act authorized the Secretary of the Treasury to act "as he might think advisable" and clearly contemplated that allowances might be paid to inspectors receiving less than the maximum salary which could not be paid to those receiving such maximum. It would seem that if this act is to be regarded as mandatory the conclusion must have been reached, as claimed by Cochnower, that when the Secretary fixed the salary of some inspectors at \$6 per diem that became the statutory salary under the act and he would have been permitted to recover \$2 per diem instead of the \$1 awarded.

But to determine the situation as it existed on the 1st of July, 1910, when Cochnower was demoted, and as it existed when this plaintiff was appointed in April, 1910, and as it existed when Cochnower was appointed at a salary of \$5 per diem, it is necessary to consider also the act of 1902. If the act of 1909 was permissive in its character it would seem that the act of 1902 must also be so construed. The language of the two acts in their essence is strikingly similar. By the act of 1902 the Secretary of the Treasury was clearly not directed to increase the compensation of inspectors, but he was "authorized" to increase the compensation "as he may think advisable and proper" by adding \$1 per day, etc. The salary being paid inspectors of customs at the time of the passage of this act was \$4 per diem. It does violence to the language of the act clearly importing a discretion to say that it increased the compensation of all inspectors to \$5 per diem and fixed that compensation as a statutory compensation. And this statement involves no issue between us and the holding in the Cochnower case, for it is not necessary in order to sustain the holding in that case to conclude that the act of 1902 by its terms fixed the salary of inspectors at \$5 per diem. The situation is sufficiently met under the theory of that case when it is said that the act being permissive in its character authorized the Secretary of the Treasury in his discretion to increase salaries of inspectors to \$5 per diem, and when he had, as in the Cochnower case, exercised that discretion, Cochnower's salary then became fixed at \$5 per diem by virtue not alone of the statute but by virtue of the exercise by the Secretary of the Treasury of the authority conferred upon him by the statute.

20 But let us consider these statutes and their operation a little further. The contention in the Cochnower case that this act of 1909 fixed the salary of inspectors at \$6 per diem was, as we have seen, not sustained by the Supreme Court and that theory upon which the original petition in this case was based has been abandoned. The theory now is in the instant case that by the act of 1902 the salary of inspectors was fixed at \$5 per day, and therefore this plaintiff, when appointed at \$4 per day, was entitled to \$5 per day. It would seem that the same process of reasoning, in the light of the decision of the Supreme Court, which would prompt the abandonment of the claim of this plaintiff for \$2 additional per day on and after July 1, 1910, must prompt the abandonment of claim for any compensation other than that paid. By the plan of reorganization under the act of 1909, provision was made for inspectors of different classes with relative salaries of \$4, \$5, and \$6 per day. The statute fixed a maximum of \$6 per day, but that it did not fix a statutory salary of \$6 per day for all inspectors is decided. And it is so decided notwithstanding the fact that the salary of some inspectors was fixed at \$6 per day. The conclusion as to the interpretation of the act is obvious. The right existed under that act to appoint inspectors at \$5 per day. And if the right to thus classify inspectors and grade salaries accordingly existed it is difficult to find any basis for the conclusion that there was not also authority to provide for another class at \$4 per day.

To sustain the theory that this might not be done and therefore to sustain the plaintiff's claim, it is necessary to revert to the preceding act of 1902; conclude that that act fixed the salary of inspectors at \$5 per day; that all inspectors were entitled to receive that salary and that the act of 1909 conferred no power to reduce, by reclassification or otherwise, the salary thus fixed.

But if the act of 1909 did not fix inspectors' salaries at \$6 per day, much less, apparently, did the act of 1902 fix them at \$5 per day. Before referring to its phraseology let us revert to conditions existing at the time of its passage. Before its passage inspectors were receiving \$4 per day, and after its passage inspectors then in the service and then inspectors, class 2, with compensation at \$4 per day, were appointed "inspectors of customs, class 4, new offices, with compensation at the rate of five dollars (\$5) per diem each." It is assumed that when this act was passed the statutory salary of an inspector was \$4 per day. But, although they were then being paid that salary, the law clearly did not so require.

When the statutes were revised in 1874 and afterward published in the second edition, known as the Revised Statutes, 1878, section 2733 was made to say that inspectors of customs should receive \$3 per day, and section 2737 authorized an increase of \$1 per day in such ports as the Secretary might think advisable and designate. Section 2733, we venture to say, did not reflect the law as it then existed, which it was no doubt intended should be the case, but it was so enacted. It may be observed here that this is the first declaration fixing a salary for inspectors instead of fixing a maximum. But there followed the act of March 3, 1881 (21 Stat., 429), over-

looked in some discussions of the matter, providing that the Secretary of the Treasury may appoint inspectors of customs at a
21 *compensation less than \$3 per day* (italics ours) when in his judgment the public service would permit.

Following so soon after the revision of 1878, it may reasonably be assumed that the very purpose of this legislation was to get away from the idea of a fixed salary as provided in section 2733, and resort to the practice prevailing from the beginning of fixing a maximum and leaving its application to the Secretary of the Treasury.

We think therefore it may be confidently asserted that when the act of 1902 was passed there was not a fixed statutory salary of \$4 per diem for inspectors, even though under statutory authority they were being paid that sum. Add to this situation a consideration of the language used in that act, and any foundation for the contention that it fixed a statutory salary of \$5 per day seems to vanish into thin air. The act itself authorized an increase of \$1 per day in the compensation of inspectors at the port of New York as the Secretary of the Treasury "may think advisable and proper," thus clearly conferring a discretion, and more, it provided it should be as compensation for services of a character which it may be assumed might or might not be performed alike by all employees of that class.

If, then, the statute itself did not fix a specific salary the only remaining basis, apparently, for the contention that there was a fixed salary must be found in the fact that the Secretary, under the authority of that act, did appoint many, and for ought we know, all of the inspectors, then class 2 at \$4 per diem, "inspectors, class 4, \$5 per diem." If in fact he saw fit to then exercise his discretion for the benefit of all the inspectors he certainly was not thereby deprived of his discretion, if he had seen fit so to exercise it, to retain all or any part of them in class 2 at \$4 per diem and deny them increases if he did not think it "advisable and proper." And if his statutory discretion remained, how can it be said that he could not, as in the case of the plaintiff herein, appoint him an inspector, class 2, at \$4 per diem? But again, and for application here, we must not forget that the act of 1881 specifically authorized the appointment of inspectors, not at \$4 or \$3 per diem but at less than \$3. And the purpose of that act, we think, was to remove a statutory bar to the exercise of a discretion which had existed for the better part of a century.

It is contended that the two statutes, or more properly speaking, provisions in deficiency appropriation acts which appropriated money to pay certain inspectors the difference between \$4 per diem, which they had received for a certain period of three months, and a statutory salary of \$5 per diem, amounted to a legislative interpretation of the act of 1902 to the effect that that act fixed a statutory salary at \$5 per diem for inspectors of customs.

It is not necessary to reach any such conclusion because of the action had by Congress in these matters. The act of 1902, which scarcely seemed to be a fit subject for legislative interpretation, was not at all ambiguous in its terms. If not ambiguous there was no cause for the application of any rules of construction and no basis

for resort to legislative interpretation. In fact, if there is any ambiguity in the situation the ambiguity arises by reason of the declarations of Congress in the deficiency acts referred to. If Congress desired to provide that the salaries of all inspectors of customs should be \$5 per day it had power to do it in a proper way. It probably had no such intention.

Aside from the discretionary feature of the act of 1902, already discussed, that act provided that such additional compensation should be for certain extra services performed at unusual hours, etc., and for certain expenses, and to conclude that Congress meant to interpret that act as providing a fixed salary for all inspectors requires a conclusion that Congress not only disregarded the discretion conferred by the act, but determined also that all inspectors were in the discharge of the extra duties for which the additional compensation was to be allowed.

By one of the deficiency acts referred to Congress did appropriate money to pay inspectors at New York the difference between the \$4 per day they had received during the months of October, November, and December, 1905, and "the proper per diem salary for the same period (\$5 per diem), in accordance with the act of Congress approved December 16, 1902." And by the other act similar provision was made in small amount to pay "certain" other inspectors.

The period involved was that between the order of October 2, 1905, and the order of January 8, 1906, referred to in Finding V. The first order evidently contemplated a return by reduction in classification to a basic pay of \$4 per day and the payment of \$1 additional for each day when services were performed at unusual hours and the second order restored the condition existing before the first. Just what the situation to be met by the deficiency appropriation was, is not clearly shown, and we are not informed whether payment was to be made to all inspectors or in the same amounts or upon a basis of equalization.

We think an examination of certain decisions of the Comptroller of the Treasury furnishes the reasons why these changes were made and shows that they were made in an attempt to meet administrative difficulties, and were justified, but we do not attach enough importance to the matter to justify going into the reasons in detail. The meat of the contention, so far as there is any, is found in the language of the deficiency acts referring to \$5 per day as the "proper per diem salary."

From some standpoint not shown the Secretary evidently concluded that he ought to adjust pay for this period on a \$5 per diem basis. As shown by official records he feared that if he made these payments from the current appropriation he would create a deficiency therein, and he thought it better to ask a deficiency appropriation for the purpose. If outside of the record, it does not do violence to our general, if not judicial, knowledge of such matters to assume that a provision in a deficiency bill appropriating a considerable sum of money to be paid to certain employees would not have gotten very far if upon its face it might not controvert the idea of a gratuity. Some reason must be given. Of what im-

portance was phraseology when money was wanted? But further discussion is not justified. We can not conclude that a plain, unambiguous act can be thus changed in its whole import by an assumed legislative construction for which there is no foundation.

23 Aside from the application of the pertinent parts of what has been said there are for consideration some fact peculiar to the instant case. Ryan was appointed inspector on April 16, 1910, and therefore at a time when the act of March 4, 1909, was the last legislation bearing upon salaries of inspectors. He, with others, was appointed "inspector, class 2, new office, with compensation at the rate of \$4 per diem, each, to take effect from date of new oath." His oath taken April 16, 1910, recited that he had been appointed "inspector, class 2." The appointment recited that the position to which he was appointed was a new office. It is not to be inferred from this recital that the collector's office in New York had never before had a classified position as inspector, class 2. For many years theretofore, and in fact, continually since the civil-service law became operative, inspectors at the port of New York had been designated by classes. The explanation of the designation of these offices to which Ryan and others were then appointed as "new offices" is found in the fact, as shown in the findings, that in January, 1906, for the purpose of restoring these officers to the grades occupied by them before October, 1905, the inspectors then in office and then designated as inspectors, class 2, at a salary of \$4 per diem, had been appointed inspectors, class 4, at a salary of \$5 per diem and by the order thus appointing them, their positions as inspectors, class 2, thus vacated, were abolished. It had been the practice whenever all employees in any one class were appointed to another class to order the positions vacated to be abolished. Apparent vacancies were thus avoided.

At and before the time of Ryan's appointment a committee appointed by the collector at the port of New York was at work on a plan of reorganization which was finally recommended by Collector Loeb to and approved by the Secretary of the Treasury and which as to the whole office became effective July 1, 1910. This plan or reorganization contemplated a classification of the inspectors at \$4, \$5, and \$6 per diem and, although, as to the whole office the reorganization was not effective until July 1, 1910, the beginning of a new fiscal year, these new appointments made in April theretofore and other new appointments made between that time and July 1, 1910, were made in anticipation of this classification, as inspectors, class 2, salary \$4 per diem. Ryan therefore from the date of his appointment received the proper salary of the office and grade to which he was appointed, and it was never during the period here involved reduced.

The position of inspector of customs at the port of New York had been within the provisions of the civil service act and the regulations thereunder from the time that said act first became operative. A board of examiners for the customs service at the port of New York had been created by the Civil Service Commission and regulations promulgated governing the examinations for appointment and for

promotions in that service. Under the civil service law a classified employee in class 2 was entitled to receive a salary of \$1,400 per year and not more than \$1,600. Salaries of inspectors at the port of New York were and always had been upon a per diem and not upon an annual basis. Under the rules, therefore, of the Civil Service Commission a per diem employee whose compensation was fixed at a given rate per diem fell automatically into the class indicated by his compensation, and a per diem employee receiving \$4 per diem or

24 \$1,460 per annum, figured upon the basis of \$4 per diem for each day of the year, fell automatically into class 2, and reversing the reasoning, if by virtue of his examination he was eligible to a class-2 appointment his salary must be fixed upon the basis authorized for that grade—that is, \$1,400 and not more than \$1,600. After first appointment as inspector he might be promoted to a higher class without re-examination. Previous to his promotion, examination and appointment as inspector, Ryan had, on January 29, 1909, been promoted to and appointed a clerk, class 1, salary \$1,200, as a result of a first-grade promotion examination. His appointment on April 16, 1910, as an inspector at \$4 per diem was the result of a promotion examination which served to place him in class 2. His eligibility then was to a class-2 appointment. A class-2 appointee must receive at the maximum a salary less than \$1,600 per annum. The highest salary on a per diem basis to which Ryan was then eligible was \$4.38 per diem, or \$4 stated in even dollars. The conclusion, therefore, seems to be forced that he was not then eligible to an appointment to a position the salary of which was \$5 per diem. Inspectors receiving salaries of \$5 per diem were and at all times during the operation of the civil service law had been rated as inspectors, class 4. Ryan was never appointed an inspector, class 4, until October 9, 1919, and never theretofore held that office. To hold that from the time of his appointment in April, 1910, he was entitled to receive \$5 per diem compensation is to hold that he was then appointed an inspector, class 4, to which he was ineligible, and if he had been so appointed his appointment under the civil service act would have been invalid.

There is one other feature of this case for consideration. If the theory of the plaintiff is correct and he in fact was entitled to receive compensation at the rate of \$5 per diem from the date of his appointment we are of the opinion that it was incumbent upon him to assert his claim within at least a reasonable time thereafter. This suit has been long pending in this court for reasons not necessary to state until now the plaintiff is in the attitude of asserting a claim which, at \$1 per diem, amounts to \$3,465. But eliminating the additions to the claim made by two amended and supplemental petitions the fact is that when he first asserted his claim the statutory period of limitations was within three days of expiration and he was then for the first time, so far as appears, asserting a claim which had been permitted to accrue from April 16, 1910, to April 10, 1916, a period of six years less six days. In his original petition he had asserted a claim for \$1 per day from the date of his appointment to and including the 30th of June of that year and at \$2 per day from that date on to and including April 10, 1916. During all of this period he had

received the compensation which we are justified in assuming he had expected to receive and all that he expected to receive when he was appointed and having been paid each month as inspectors are regularly paid he had, so far as appears, at no time asserted any right to compensation other than that received by him. The Supreme Court has declared itself very emphatically with reference to the effect of such conduct on the part of a Government employee. There are so many manifest reasons why a Government employee should not be permitted for a long period of time to receive without

25 protest the compensation which it may be assumed that he and his appointing officer both deemed him entitled to receive and afterwards assert a claim for a large amount of accrued compensation, that it is not deemed necessary to discuss them here. We refer to the case of *United States v. Garlinger*, 169 U. S. 316 at 322 and cases cited.

It is not necessary to invoke all the propositions stated to justify a conclusion against the right of the plaintiff to recover but upon them all there would seem to be no possible room for any other conclusion. We are of the opinion that the plaintiff is not entitled to recover, that his petition must be dismissed, and we have so ordered.

Graham, Judge; Hay, Judge; Booth, Judge, and Campbell, Chief Justice, concur.

26

VII. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Twenty-first day of February, A. D., 1921, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendant, and do order, adjudge and decree that the plaintiff, as aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and from the United States; and, that plaintiff's petition be and the same hereby is dismissed: And it is further ordered, adjudged and decreed that the United States shall have and recover of and from the plaintiff herein the sum of Nineteen Dollars and fifteen cents (\$19.15), the cost of printing the record in this court, to be collected by the Clerk, as provided by law.

By THE COURT.

VIII. *Plaintiff's Application for and Allowance of an Appeal.*

The claimant makes application for Appeal to the Supreme Court of the United States.

SPOOR & RUSSELL,
Attys. of Record.

DUDLEY & MICHENER.

Filed March 21, 1921.

Ordered: That the above appeal be allowed as prayed for.

By THE COURT.

March 21, 1921.

27

Court of Claims.

No. 3323.

THOMAS F. E. RYAN

vs.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact and conclusion of law; of the opinion of the Court by Downey, J.; of the judgment of the Court; of the plaintiff's application for and allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Twenty-third day of March, A. D., 1921.

[Seal of the Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 28,219. Court of Claims. Term No. 292. Thomas F. E. Ryan, appellant, vs. The United States. Filed April 9th, 1921. File No. 28,219.

(4200)

Supreme Court of United States

October Term, 1921.

No. XXXX 64

THOMAS F. E. RYAN,

Appellant,

vs.

THE UNITED STATES.

Appeal from the Court of Claims.

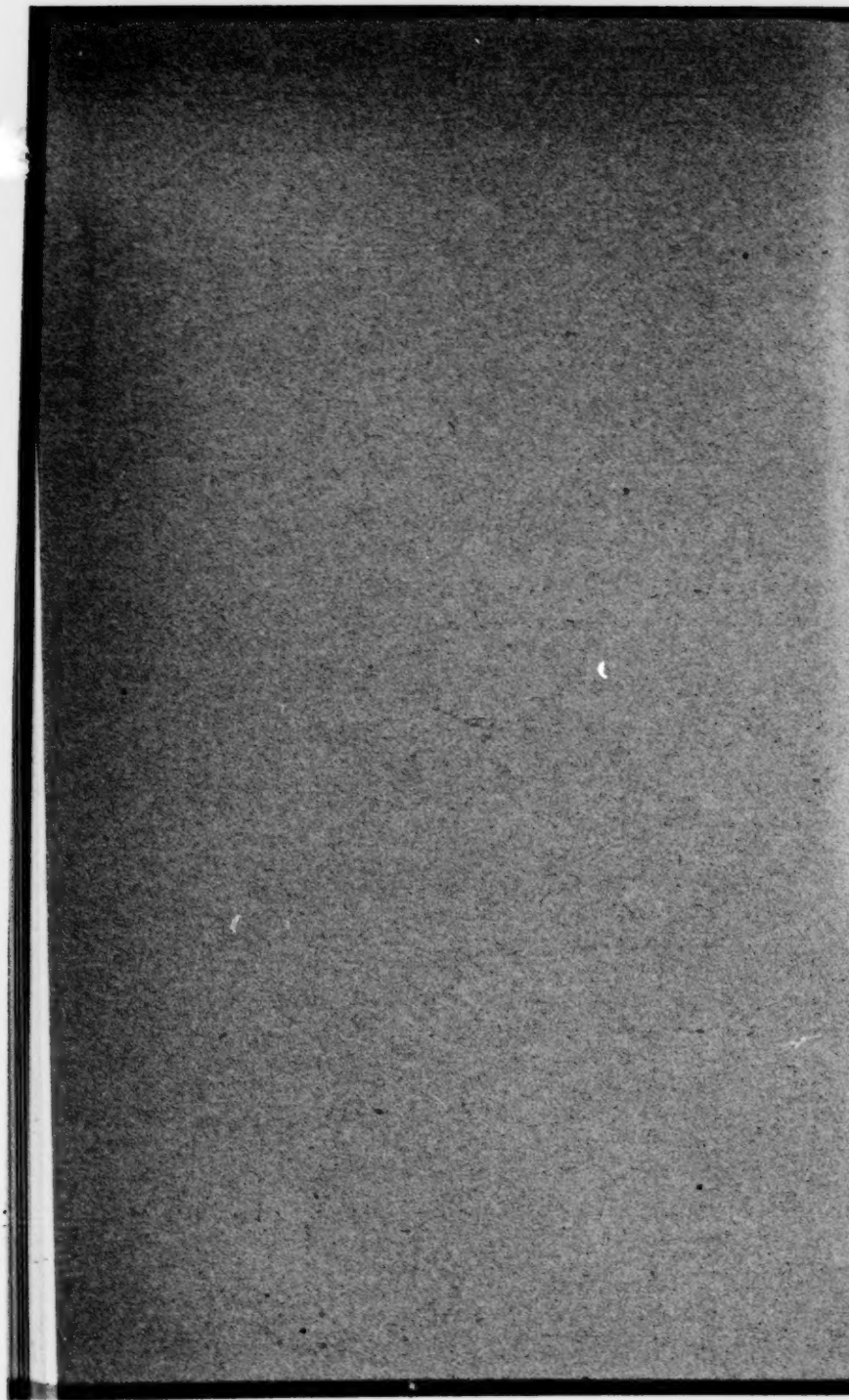
APPELLANT'S BRIEF.

WILLIAM E. RUSSELL,

LOUIS T. MICHEMER,

PERRY G. MICHEMER,

Attorneys for Appellant.



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Act of March 4, 1909, C. 314, Sec. 2, 35 Stats., 1065	2, 3, 16
Act of February 13, 1911, C. 46, Sec. 5, 36 Stats., 899	32
Act of August 24, 1912, C. 355, 37 Stats., 434	41
Judicial Code, Sec. 145, 156	23
R. S. 163, 167	40
R. S. 2733	8, 38
U. S. Compiled Statutes, 1913, S. 5327	41



IN THE
**Supreme Court of the United
States**

October Term, 1921.

THOMAS F. E. RYAN,

Appellant,

vs.

THE UNITED STATES.

No. 292

APPEAL FROM THE COURT OF CLAIMS.

Statement of the Case.

I.

This is one of some 320 "class" cases that were held in the Court of Claims pending the decision of this Court in the test case of *Cochnowar vs. United States*, 248 U. S. 405, and 249 U. S., 588. It was thought by counsel in the case at bar, who also appeared as counsel for Cochnowar, that the decision of this Court in the latter case would render unnecessary the trial of any other of the pending cases. In this view and hope the attorneys for the Government concurred. The claimants in all of these 320 cases were customs inspectors in the port of New York. The claims were in part founded upon the contention that the New York inspectors were entitled to a compensation of \$6 *per diem* on and after the passage of the Act of

March 4, 1909 (C. 314, 35 Stat., 1065). There were some 375 such inspectors at New York at the time of the passage of this act and all of them were receiving \$5 *per diem* (R. 9), pursuant to the Act of December 16, 1902 (C. 2, 32 Stat., 753). Claiming to act under the authority of the Act of 1909, the secretary of the treasury appointed a committee in 1910 to classify and grade the New York inspectors. Under the committee plan, which went into effect July 1, 1910, 52 of the inspectors were *increased* to \$6 *per diem*, while 52 others were *demoted* to \$4 *per diem*, leaving the balance, about 270 in number, at their former salary of \$5 *per diem*, thus causing no increase in salary expense (R. 10). The appellant Ryan was appointed at \$4 *per diem* on April 16, 1910, some two and a half months before the "classification" and "grading," became effective. Following Ryan's appointment, there were some 20 or 25 others appointed at \$4 *per diem* in advance of and in anticipation of the committee's plan (R. 9, finding VI). There were several inspectors removed on July 1, 1910, when the "classification" went into effect, others resigned and transferred, and each vacancy thus created was filled by the appointment of a new man at \$4 *per diem*. Owing to the committee's recommendations, it was found necessary to increase the force at New York by appointing some 50 additional inspectors. These appointments were all made at \$4 *per diem*.

II.

In July, 1914, the Cochnower suit was filed in the Court of Claims. Prior to that time, however, the

inspectors had endeavored to get a favorable ruling from the department on their claim of \$6 for all. Their efforts were unsuccessful, for in May, 1914, the Comptroller of the Treasury, George E. Downey, denied their claim (see Comp. Opinion May 7, 1914, appeal No. 23590). Two months later the test suit was filed in the Court of Claims. It was decided by counsel to take the case of a \$4 inspector for the test suit as it was thought that the rights of both the \$4 and \$5 inspectors could and would be settled in one litigation. Cochnower was selected as he was a \$4 man and was anxious to have his claim put forward as the test case. Cochnower sued for \$6 *per diem* from July 1, 1910 (the date of his demotion to \$4), to the date of the filing of his petition. He claimed two things: (1st) That there was no power to reduce the salary of his office below \$5 *per diem* and by reason thereof he was entitled to recover \$1 *per diem*, and (2nd) that he should have been promoted to \$6 *per diem* under the Act of March 4, 1909 (C. 314, 35 Stat. 1065, Sec. 2), along with other inspectors on July 1, 1910, and by reason thereof he was entitled to an additional \$1 *per diem*. This Court sustained his first claim but denied his second (249 U. S., 588).

III.

After the filing of Cochnower's petition on July 6, 1914, the other 320 claims were duly filed in the court below from time to time. The Ryan claim (the case at bar) was filed April 13, 1916. The Cochnower case was argued in the court below on the same day. All of the 320 claims were filed within the 6

years' statute of limitations. By consent of counsel on both sides, no action was taken in any of the other 320 cases, but they were allowed to remain on the general docket in the court below to await the outcome of the Cochnower case.

IV.

The cases were divided into two groups: Group 1, known as the "\$5 cases," consisted of some 200 claims of \$5 *per diem* inspectors where a recovery of \$1 *per diem* was sought; Group 2, known as the "\$4 cases," was composed of 120 claims of \$4 inspectors where a recovery of \$2 *per diem* was sought.

V.

When the mandate of this Court in the Cochnower case was presented in the court below in April, 1919, it was agreed between counsel and the Court that the "\$5 cases" should be dismissed and judgment entered in the "\$4 cases," but only for \$1 *per diem* as that was the recovery allowed to Cochnower. All of the 320 cases were put on the calendar of the court below for a subsequent date, sufficient time being allowed to obtain the necessary information from the Treasury Department to permit the entry of correct judgments in the "\$4 cases." On the date set the "\$5 cases" were called (some 200 in number), and all were dismissed on consent of counsel. The "\$4 cases" were then called and a motion for judgment in each case was duly made. These motions were denied except in about 35 cases, the Court contending that there was a

distinction in law in the "\$4 cases"—that all of them did not stand on the same basis. Of the "\$4 cases," 35 claims were filed by inspectors who, like Cochnower, had been demoted from \$5 to \$4 *per diem* on July 1, 1910. The other 85 claims were those of inspectors who had been appointed at \$4 *per diem* after the passage of the Act of March 4, 1909.

VI.

Judgments were duly entered in the 35 cases for about \$1,000 each. It became necessary under the ruling of the Court below to start *de novo* with one of the 85 cases remaining on the calendar. The Ryan case was selected as he was the first appointee to the \$4.00 grade. Counsel on both sides entered into a written stipulation and filed same in the Court below, that the decision in the Ryan case should govern and control the 84 other pending cases. The Ryan case was argued in the Court below on November 11, 1920, and again on January 11, 1921. On February 21, 1921, the petition was dismissed and this appeal was thereupon taken. The other 84 cases are in the Court below awaiting the decision of this Court in the instant case.

All of the foregoing facts are of public record.

VII.

Ryan's original petition (See R. 12) asked for judgment at the rate of \$2.00 *per diem* (as did the Cochnower and all the other similar cases), but after this Court decided that Cochnower was entitled to recover only \$1.00 *per diem*, an amended and supple-

mental petition was filed by Ryan, reducing his claim to \$1.00 *per diem* (R. 1-5).

Ryan was appointed at \$4.00 *per diem* on April 16, 1910 (R. 7).

Promoted to \$5.00 *per diem* October 10, 1919 (R. 7)

Promoted to \$5.50 *per diem* July 1, 1920 (R. 7).

This suit is to recover \$1.00 *per diem* from April 16, 1910 to October 10, 1919 (R. 1-5).

Ryan, like most of his associates, had been promoted from a clerkship to his office as an inspector after passing the necessary examination. Many of his associate inspectors were promoted from similar clerkships but were paid \$5.00 *per diem* as inspectors, while Ryan received only \$4.00 *per diem*. Under the "Committee" plan of 1910, there was no definite fixed salary basis provided except as above stated; each inspector received such salary as the Collector saw fit to pay; the Acts of Congress did not seem to have much weight there.

VIII.

Ryan is still an inspector at the port of New York (R. 11). He was promoted to the *proper* salary of his office, \$5.00 *per diem*, on October 10, 1919, and has since that time been given a further promotion for merit under the Act of March 4, 1909.

He comes to this Court asking that his back pay at the rate of \$1.00 *per diem* be awarded him from the date of his appointment in 1910 to the date when he received his lawful salary in 1919.

IX.**The record below.**

Petition was filed in the Court below April 13, 1916 (R. 1). By leave of Court, an amended petition was filed July 2, 1919 (R. 1). Motion for leave to file amended paragraphs to amended petition was filed in open court April 13, 1920 (R. 1). Motion overruled April 19, 1920 (R. 1). Motion for leave to file supplemental petition filed April 24, 1920 (R. 1). Motion ordered to files to await trial May 3, 1920 (R. 1). Motion for leave to file amended and supplemental petition made in open Court November 11, 1920. Motion allowed and claimant given five days to file said petition (R. 1). Amended and supplemental petition filed November 12, 1920 (R. 1-5). General traverse was entered before argument and submission of case November 11, 1920 (R. 6). On December 13, 1920, order was entered remanding case to the calendar for reargument, the Court having made a call on the Treasury Department on its own motion (R. 6). Case was reargued and submitted on January 11, 1921 (R. 6). Findings of Fact, Conclusions of Law, and Opinion of the Court were filed February 21, 1921. Petition was dismissed on the same day (R. 12). Application for appeal was made and allowed March 21, 1920 (R. 22).

Assignment of Errors.

The Court below erred:

First: In dismissing the petition;

Second: In not rendering judgment for the claimant in the sum of Thirty-four hundred sixty-five (\$3465) dollars.

Brief of Argument.

I.

The salary of the office of inspector of customs at the Port of New York, at the time of appellant's appointment, was fixed by law at \$5 per diem.

Prior to 1864, the compensation of the office of inspector of customs at the Port of New York was \$3.00 *per diem* (R. S. 2733). This salary was increased to \$4.00 *per diem* by the Act of April 29, 1864 (C. 71, 13 Stat., 61). The salary of \$4.00 *per diem* was continued until January 1, 1903, when the same was increased to \$5.00 *per diem* pursuant to the Act of December 16, 1902, as follows:

Act of December 16, 1902, c. 2, 32 Stats., 753, entitled

"An Act regulating the duties and *fixing the compensation* of the customs inspectors at the *Port of New York*." (Italics ours.)

"That the Secretary of the Treasury is hereby authorized to increase the compensation of inspectors of customs at the Port of New York,

as he may think advisable and proper, by adding to their *present* compensation a sum not exceeding one dollar per day, which additional compensation shall be for work now performed by them at unusual hours, for which no compensation is now allowed, and shall include work performed by said inspectors at night in examining passengers' baggage, and also as reimbursement for expenses incurred by them for meals and transportation while in the discharge or performance of their official duties." (Italics ours.)

All of the New York inspectors received the increase to \$5.00 *per diem* (R. 9, Finding VI).

The Secretary of the Treasury attempted to reduce this compensation at the Port of New York on October 1, 1905, by reducing the salaries of all the inspectors at said port to \$4.00 *per diem*. Thereafter, *being advised that he could not make the reduction, he* restored said compensation on or about the 8th day of January, 1906 (*Cochraner vs. U. S.*, 51 Ct. Cls., 461; Finding V).

It is contended by the Court below that the Secretary of the Treasury was not compelled to exercise the power conferred in the Act of December 16, 1902 (c. 2, 32 Stats. 753), to increase the salaries of the New York inspectors by \$1.00 *per diem*, but the fact remains that he did exercise the power immediately and raised the salary of the office to \$5.00. The act gave him no power to reduce the salary, he having once raised it. He was given the discretionary right to say whether or not the salary should be fixed at \$5.00 and he so fixed it. His delegated power then ceased, as he discovered when he subsequently endeavored to reduce the salary to the old scale; viz, \$4.00 *per diem*.

The title to the act also indicates that Congress intended that the Secretary should fix the salary.

The matter of the attempted reduction of the New York inspectors was brought to the attention of Congress, and that body appropriated in two different acts sufficient moneys to pay them the difference between the salary paid them of \$4.00 during the three months' period of the reduction and their proper salary of \$5.00 *per diem*. We quote both of these acts:

Act of June 30, 1906, c. 3912, 34 Stats., 636. Deficiencies Appropriation Act, in part as follows:

"To pay the inspectors of customs of the *Port of New York* the *difference* between the *per diem* salary of four dollars paid them during the months of October, November and December, 1905, and their *proper per diem salary for the same period (five dollars per diem)* in accordance with the Act of Congress approved December 16, 1902, thirty-one thousand dollars, or so much thereof as may be necessary." (Italics ours.)

Act of March 4, 1907, c. 2919, 34 Stats., 1373. Deficiencies Appropriation Act, in part as follows:

"To enable the Secretary of the Treasury to pay to certain inspectors of customs of the *Port of New York* the *difference* between the *per diem* salary of four dollars paid them during the months of October, November and December, 1905, and their *proper per diem salary of five dollars* for the same period, nine hundred forty dollars." (Italics ours.)

The reasons for the foregoing acts are set forth in a letter from the Acting Secretary of the Treasury to the

Chairman of the House Committee on Claims, as follows:

"April 14, 1906.

"Hon. James M. Miller,
Chairman Committee on Claims,
House of Representatives

"Sir:

"Replying to your letter of this date, enclosing copy of H. R. 17,957, for the relief of the day inspectors of customs at the port of New York, and requesting that your committee be furnished with facts and information concerning this claim and an opinion touching the merits of the case, I have the honor to state that under the act of Congress approved December 16, 1902, the compensation of all the inspectors of customs at the port of New York was increased from four dollars *per diem* to the rate of five dollars *per diem* and continued at that rate until September 30, 1905, following which date the department directed a reduction in their compensation to the rate of four dollars *per diem*. Under a decision of the Comptroller of the Treasury, dated, December 29, 1905, the compensation of these inspectors was again increased to the rate of five dollars *per diem* beginning January 1, 1906, and for the purpose of allowing such inspectors the additional compensation of one dollar *per diem* each from October 1, 1905, to December 31, 1905, inclusive the bill enclosed in your letter was introduced.

The department favors the passage of the bill, but recommends that the money required for the purpose shall be made payable out of any money in the Treasury not otherwise appropriated, rather than out of the current appropriation for expenses of collecting the revenue from customs, for the reason that it would probably

result in a deficiency in that appropriation, which the department desires to avoid, and by close economy will avoid, unless this additional expense is put upon it.

Respectfully,

(Signed) J. B. REYNOLDS,
Acting Secretary."

(Italics ours.)

The foregoing letter is not a part of the record in this case but it is in the files of the Treasury Department and the House Committee on Claims and is a public document and as such, this Court will take judicial notice thereof.

New York Indians vs. United States, 170 U. S. 1, 32.

The Paquette Habana, 175 U. S. 677, 696.

Furthermore, this letter was a part of the record of the Cochnower case in the Court of Claims (51 Court of Claims 461). It was produced by the Treasury Department in response to a motion by the claimant for a call on the department, and was printed in the Cochnower record in the Court of Claims at page 143 thereof.

Taking up for consideration the Act of 1902, and the interpretation thereof by Congress in the Acts of 1906 and 1907, above quoted, we find a positive legislative declaration that the Act of 1902 was intended to fix the pay of inspectors at the Port of New York at five (\$5) dollars *per diem*. If such is not the conclusion to be deduced from these acts, what could have been in the legislative mind when it said "to pay the inspectors of customs of the Port of New York the *difference* between the *per diem* salary of \$4 paid them during the months of October, November and Decem-

ber, 1905, and their *proper per diem salary for the same period (\$5) per diem, in accordance with the Act of Congress approved December 16, 1902*"? (Italics ours.) The word "accordance" is most significant. It means "agreement; harmony; conformity." *Webster*. Thus we have a direct legislative declaration of the meaning of the Act of 1902. It must be given force as a Congressional interpretation of prior legislation or as a retroactive statute fixing the salary at \$5 *per diem*. The result is the same in either case. The word "proper" means "correct," "rightful," "lawful," while the word "accordance" adds its positive assertion, and we cannot ignore the meaning of these plain declarations. Congress not only said that \$5 *per diem* was the *proper* salary but that it was the proper salary in *accordance with the Act of December 16, 1902*. The salaries of the New York inspectors, we contend, were legislatively fixed thereby, and must stand at such rate until Congress enacts to the contrary. In 1909 the maximum salary was raised to \$6 *per diem*, as we shall show hereafter, but the legislative minimum of \$5 fixed as above stated, has never been disturbed by Congress.

The case of *James vs. The United States*, 202 U. S. 401, is on all fours with the case at bar in this respect. In the *James* case the salary of the Judges of the Supreme Court of the District of Columbia was fixed at \$4,000 by the Act of 1866. By an act passed June 30, 1891, Congress appropriated \$5,000 for the salary of each of said judges. The appropriation act of the following year only appropriated \$4,000 for each of them. Justice James retired from that court in December, 1892, and was paid the said sum of \$4,000 during

his retirement. After his death his administratrix brought suit for the additional \$1,000 *per annum*. The case turned upon the proper construction of the Deficiencies Appropriation Act of March 2, 1895, as follows:

"To pay the Chief Justice and five Associate Judges of the Supreme Court of the District of Columbia the difference between the rate of compensation received by them and five thousand dollars per annum for the fiscal year 1893."

It is to be noted how nearly alike the above language is to the Act of June 30, 1906, relied on by this appellant. In fact, the Act of 1906 is stronger than the act just above quoted, as indicative of the legislative declaration of the meaning of a former statute, for the Act of 1906 said that the *proper* salary of inspectors of customs was \$5 per diem, *in accordance with the Act of 1902*, whereas in the *James* case the subsequent statute omits to say that \$5,000 was the proper salary of the district judges.

In the *James* case both the Acts of 1891, appropriating \$5,000 for the salary of the justices, and of 1892, appropriating only \$4,000, contained the usual clause repealing all acts and parts of acts inconsistent therewith.

This Court, in giving judgment to the administratrix of Justice James, decided that Congress had the power to declare the meaning of a previous statute so as to bind the courts thereafter.

The language of the Court, speaking through Mr. Justice White, at page 407, clearly held that the Act of 1895, was to be given efficacy either as a Congressional interpretation of the prior legislation or

as a retroactive statute fixing the salary for the year 1893.

In the light of the above authority, how then can it be said that the Act of 1906, in the case at bar, had no binding effect upon the Secretary of the Treasury? Clearly, Congress fixed the pay of the office of inspector at New York at \$5 *per diem*.

It is a well settled rule of law that a legislative body may declare the meaning of a previous statute so as to bind the courts with reference to all transactions occurring thereafter, for such declaration is equivalent to new legislation.

United States vs. Freeman, 3 How. 556.

Stockdale vs. Insurance Co., 20 Wall. 323.

Cope vs. Cope, 137 U. S. 682.

Swigart vs. Baker, 229 U. S. 187.

We submit that the words that we have italicized in the Acts of June 30, 1906 and March 4, 1907, must be construed according to the doctrine announced in the foregoing cases or else be wholly deprived of any significance or force whatever, for to deny such meaning renders them merely idle and useless words. Those acts appropriated money to pay the *difference* between the *per diem* salary of \$4.00 paid the inspectors at New York in the months named therein and their "*proper per diem salary of \$5, in accordance with the Act of 1902.*" To disregard the declaratory words in these acts would be to hold that Congress twice did the idle and useless thing of including them.

And, having fixed the salary at \$5 *per diem*, it becomes pertinent to inquire as to whether or not Congress has authorized a reduction thereof. The only

salary legislation affecting the New York inspectors since the Act of December 16, 1902, is the Act of March 4, 1909 (c. 314, Sect. 2; 35 Stat. 1065) as follows:

"That the Secretary of the Treasury be, and he is hereby authorized *to increase and fix* the compensation of inspectors of customs, *as he may think advisable, not to exceed* in any case the rate of six dollars *per diem*, and in all cases where the maximum compensation is paid no allowance shall be made for meals or other expenses incurred by inspectors when required to work at unusual hours." (Italics ours.)

It is clear that the foregoing statute authorizes *only* an increase, the amount thereof to be in the discretion of the Secretary of the Treasury, but not to exceed \$6 *per diem*. Where, then, is the authority of the Secretary of the Treasury to be found to reduce the salary of this office below \$5 *per diem*? It is idle, however, to discuss these propositions further for this Court considered them all in the *Cochran* case, 248 U. S. 405, and 249 U. S. 588, and decided them contrary to the rulings of the Court below in the instant case. In that case, the claimant, an inspector of customs at the Port of New York, was receiving the fixed salary for that office of \$5 *per diem* on July 1, 1910, when he was reduced by the Secretary of the Treasury to \$4 *per diem*. He brought suit for the difference between his lawful salary of \$5 and the sum actually paid him after his reduction, viz, \$4. He also claimed an additional one dollar *per diem*, contending that he should have been increased to \$6 *per diem* on July 1, 1910.

Cochnower's claim for the one dollar *per diem* that was taken away from him was based solely upon the ground that he was holding an office, the salary of which had been fixed by law at \$5 *per diem*, and that, therefore, the Treasury Department had no right to reduce same without authority of Congress. Counsel for Cochnower maintained this contention consistently through the entire litigation in the Court of Claims and in the Supreme Court. At no time during that litigation was there any contention made that the department had no right to demote the claimant. The contention was made that while Cochnower might have been lawfully reduced to a clerkship or other position by the Secretary of the Treasury, the *salary of his office could not be reduced*. In the first brief filed by Cochnower's attorneys in the Court of Claims, on page 23, there appears the following statement of this contention:

"There was no authority vested in the Secretary of the Treasury by virtue of the Act of March 4, 1909, nor any other act, to reduce the salary of the office held by claimant to \$4 *per diem* (1), because there is no power vested in an executive officer to change (either decrease or increase) the salary of a public office fixed by law; (2), because such reduction clearly contravened and evaded the intent of the Act of March 4th, 1909, *supra*; (3), because Congress had definitely fixed by special statutes the salary of the office of inspector of customs at the Port of New York, at \$5 *per diem*."

In Cochnower's reply brief in the Court of Claims, at page 109 thereof, this same contention was again clearly stated as follows:

"Claimant was unlawfully reduced to a four dollar *per diem* salary because the salary of his office at the Port of New York had been fixed by law at \$5 *per diem*."

When the *Cochnowar* case reached this court, counsel again stated clearly this contention in the brief, page 21 thereof:

"An executive officer may not change a salary fixed by statute. It is well settled that when Congress has fixed the salary of a public officer by statute that an executive officer may not increase or decrease same. The ruling above announced has been conclusively settled by this Court (*Glavey vs. United States*, 182 U. S. 595; *United States vs. Andrews*, 240 U. S. 90). Appellant insists that the statutory salary was fixed in the Port of New York by the Acts of 1902 and 1906 at \$5 *per diem* for inspectors of customs."

Again, in this court, this contention was restated by counsel in the brief responding to the Government's petition for a rehearing. On page 2 of said brief appears the following:

"8. The salary of the *office of inspector* at New York had been *fixed by law* at \$5 *per diem* prior to the Act of March 4, 1909."

On page 8 of said brief the proposition was again set forth in the following language by counsel:

"We do not for one moment dispute the power of the secretary to remove or to reduce this appellant, or any other officer in the customs service, from one position to another. What we have found fault with in the instant case, is that the secretary attempted to reduce the *salary of an office* when same had been

fixed by law. * * * In order to hold that there was no right of reduction, as this Court has held, the Court had to determine first whether appellant held a position to which there was a salary *fixed by law*. We are not dealing at all with a case involving the discretion of the Secretary of the Treasury. We concede that the Court will not interfere with an administrative officer in the exercise of his discretionary power. However, when a salary has been fixed by law, the administrative branch of the government may not increase it or decrease it (*Glavin vs. United States*, 182 U. S. 595; *United States vs. Andrews*, 240 U. S. 90).

"Therefore it follows that this Court did consider the acts prior to the Act of 1909, and did hold that the salary of the office of inspector in the Port of New York had become fixed at \$5 *per diem* and could not be reduced by administrative action."

This Court squarely held in the *Cochnowicz* case that there was no authority vested in the Secretary of the Treasury to decrease the salary of inspectors at the Port of New York, and we submit that this decision is conclusive in the instant case. There is no possible theory upon which *Cochnowicz* could have been awarded a judgment by this Court except the one theory advanced by his counsel and sustained by the Court, that his right to recover depended upon whether or not he held an office, the salary of which had been fixed by law.

It is true that the appellant in the case at bar was not reduced from \$5 to \$4 *per diem* but was originally appointed at the lower rate. The principle, however, is precisely the same. Ryan was appointed

to an office to which the law affixed the salary of \$5 *per diem*. His acceptance of a lower salary could not have the effect of changing the law. The Secretary of the Treasury had no power to change this salary and manifestly no act on the part of his subordinate, the appellant Ryan, could invest the secretary with a power that the latter did not possess. This principle was clearly enunciated in the case of *Miller vs. United States*, 103 Fed. 413; *Glavey vs. United States*, 182 U. S. 595. In the *Glavey* case, at page 609, the Court quoted with approval the following language of Judge Lacombe in the *Miller* case:

"Any bargain whereby in advance of his appointment to an office *with a salary fixed by legislative authority*, the appointee attempts to agree with the individual making the appointment that he will waive all salary or *accept something less than the statutory sum*, is contrary to public policy, and should not be tolerated by the courts. It is to be assumed that Congress fixes the salary with due regard to the work to be performed, and the grade of man that such salary may secure. It would lead to the grossest abuses if a candidate and the executive officer who selects him may combine together so as entirely to exclude from consideration the whole class of men who are willing to take the office on the salary Congress has fixed but will not come for less. And if public policy prohibits such a bargain in advance, it would seem that a Court should be astute not to give effect to such illegal contract by indirection, as by spelling out a waiver or estoppel." (Italics ours.)

An exactly parallel case on the facts is that of

Adams vs. United States, 20 Ct. Cls. 115.

Adams was appointed inspector of customs for Lake Champlain District, May 8, 1874, at \$2.50 *per diem*.

Adam's office carried a salary of \$3.00 *per diem* under R. S. 2733.

Adams waited almost 6 years before filing suit.

Adams was *allowed* judgment for the difference in pay by the Court of Claims.

Ryan was appointed inspector of customs for Port of New York, April 16, 1910, at \$4.00 *per diem*.

Ryan's office carried a salary of \$5.00 *per diem* under Act Dec. 16, 1902; Act June 30, 1906.

So did Ryan wait.

Ryan was *denied* judgment for the difference in pay by the Court of Claims.

The Court of Claims had this same proposition of law before it on at least two other occasions and allowed judgment for the claimants.

See:

Rush et al. vs. United States, 35 Ct. Cls. 223.

Jacobs vs. United States, 41 Ct. Cls. 452.

This Court considered and approved the ruling in the *Adams* case in the *Glavey* case, *supra*. Mr. Justice Harlan, speaking for the Court, said at page 607, referring to and quoting from the *Adams* case:

"We do not think he thereby relinquished his right to claim the further compensation allowed by law. If the appointing officer had no power to change the compensation of the inspector, certainly the paying officer has not. He had no right to exact such a receipt and the claimant loses nothing by signing it." (Cases cited.)

Mr. Justice Harlan stated further, at page 609, in the *Glavey* case:

"It was not competent for the Secretary of the Treasury, having the power of appointment, to defeat that purpose by what was, in effect, a bargain or agreement between him and the appointee that the latter should not demand the compensation fixed by statute."

From the foregoing it is clear that claimant should have been appointed at \$5 *per diem* on April 16, 1910, and that his acceptance of a lower salary has not barred him from recovering the difference between the salary received, namely, \$4 *per diem*, and the lawful salary of \$5. The \$5 salary attached to the office when the appointment was made.

In the *Glavey* case, the claimant waited six years, short of three days, before filing his suit, so it would seem that the argument of the Court below in the instant case (R., bottom p. 21 and top p. 22), that Ryan waived his rights by delaying the filing of his suit for about six years, ignores its own ruling in the *Adams* case and the ruling of this Court in the *Glavey* case. However, this raises the question of laches and estoppel which we shall discuss more fully in the next point.

II.

Estoppel.

There is in this case no form or kind of estoppel.

In the concluding portion of the opinion (R. 21, 22), it is contended that the appellant lost his right to make claim to increased compensation because he did not assert his rights until near the expiration of the statutory period of six years.

1. We will first deal with that proposition on the theory that it means that the appellant lost his right through laches of one kind or another, either abandonment, acquiescence or undue delay, and we submit that the doctrine of laches does not apply.

The United States has consented that it may be sued in the Court of Claims on "all claims founded upon the Constitution of the United States or any law of Congress" * * * (*Judicial Code*, Sec. 145, c. 231, 36 Stat. pp. 1087, 1136); and Section 156, page 1139, enacts that the petition must be filed "within six years after the claim first accrues" or it "shall be forever barred." These are re-enactments of statutes long in force, and it will be observed that they confer the legal right to sue within six years on a claim founded on a law of Congress, as in the instant case.

We submit that these statutes do not stand in need of interpretation, but we will call attention to a few of the many cases that are in point here, each of which originated in the Court of Claims.

(a) In the case of the *United States vs. Northern American Transportation and Trading Company*, 253 U. S. 330, the corporation sued for the value of land, a mining claim which was first occupied by the government for military purposes, July 1, 1900 (pp. 331, 332). The action was filed in the Court of Claims December 7, 1906 (p. 331), or just one day less than six years after the President issued an order reserving the land from sale and setting it aside for military purposes, the order being dated December 8, 1900, and the land was continuously afterwards held and occupied by the United States (p. 332).

The government contended that the taking and occupation began more than six years before the commencement of the suit, and hence the action was barred. The Court below found (53 Ct. Cls., 424, 428) that the property was taken within six years; that is, on December 8, 1900, the date of the President's order, and that its value was \$23,800.

This Court said (p. 334):

"Since the cause of action arose after December 7, 1900, this suit was not barred by Section 156 of the Judicial Code."

The judgment of the Court below was affirmed.

In that case the claimant "stood by" for six years, less one day, and yet it did not lose its right of action. The Courts saw no kind of laches there and we submit there is none here. It will be noted that the case at bar is even stronger in favor of appellant, for here the whole right of action did not accrue on one day or in one year, but accrued and increased from day to day. We submit that the instant case is within the rule laid down in the case above cited.

(b) But there is abundant authority to be found in the reports of the Court of Claims deciding compensation, fee or salary cases, in which it is held that the six-year statute does not begin to run until the compensation or salary is due and payable and that the official, within the six years, may sue the United States and recover.

Among the many cases of the kind are these:

Bachelor vs. United States, 8 Ct. Cls. 235, 239, 240;

Lawson vs. United States, 14 Ct. Cls. 332, 339 (Affirmed in 101 U. S. 164, 169);

Ellsworth vs. United States, 14 Ct. Cls. 382, 395 (Affirmed in 101 U. S. 170);

Mosby vs. United States, 24 Ct. Cls. 1;

Book vs. United States, 31 Ct. Cls. 272;

Adams vs. United States, *supra*;

Glazey vs. United States, *supra*.

In those cases recoveries were had for items or amounts falling due at various periods within the six years prior to filing the petitions and, though the items or amounts so falling due were of the same nature, the Courts did not consider or hold that the claimant had been guilty of laches in not suing when any of the items or demands fell due, though each claimant waited long thereafter before suing. In each case the officer went right on with the discharge of his official duties in the years while his right of action was accumulating in amount, just as this appellant did, but neither Court thought or held him guilty of laches.

(c) But laches is no defense to an *action at law*. If the plaintiff in such an action files his petition with-

in the statutory period, the Court cannot deprive him of his right to proceed.

Werhman vs. Conklin, 155 U. S. 314, 326.

The same situation existed in the *Cochnowar* case (51 Ct. Cls. 461).

The record in this court (pp. 1-3) and the opinion of the Court below (p. 464) show that Cochnowar sued for additional salary covering a period of five years, he occupying the office all the time and receiving salary at the rate of \$4 *per diem*, it having been decreased to that amount unlawfully by the Secretary of the Treasury. Neither this Court nor the Court below considered or held that his failure to sue earlier deprived him of the right to recover.

2. Abandonment, acquiescence, laches and waiver are but features of the law of estoppel, and we submit that the facts here are such that there can be no estoppel against the appellant.

(a) The petition avers (R. 1, 2) and Finding XII (R. 11) states that appellant was holding his office from April 16, 1910, to November 12, 1920, various amended and supplementary petitions having been filed during the pendency of the case. The findings, opinion and judgment are dated February 21, 1921 (R. 6, 22).

This is the opening sentence of the opinion (R. 12):

"The plaintiff was, during the period here involved, and still is, an inspector of customs at the Port of New York."

The government was not misled to its injury by the conduct of the appellant. His original petition was filed April 13, 1916, in which he claimed additional compensation at \$1 *per diem* from April 16, 1910. An amended petition was filed July 2, 1919, in which the additional pay was claimed down to June 30, 1919, and an amended and supplemental petition was filed November 12, 1920 (Finding XII, R. 11), in which the additional pay was claimed from April 16, 1910, to and including October 10, 1919 (R. 5, par. XII). Appellant, in that petition, did not claim additional pay after October 10, 1919, because on the following day he was promoted to \$5 *per diem* and August 25, 1920, he was promoted to \$5.50 *per diem* (foot of Finding II, R. 7).

Thus it appears that appellant, by this litigation, was insisting on that additional pay, and that he was *promoted and given it one year and three months before the case was finally tried in the Court of Claims, January 11, 1921* (R. 6).

But aside from all this, we submit that if the case involved only the period from April 16, 1910, to the time he filed this action, April 3, 1916, the government was not misled to its injury by the appellant in taking pay at \$4 *per diem*. The government lost nothing by that conduct on the part of appellant.

In *Ketchum vs. Duncan*, 96 U. S. 659, 666, this Court said:

"An estoppel *in pais* does not operate in favor of everybody. It operates only in favor of a person who has been misled to his injury, and he only can set it up."

Legal rights are not lost by the silence or inaction of one party that *does not produce a change of position that results injuriously to the other party*. This is a well-settled rule of the law of estoppel.

Jones vs. United States, 96 U. S. 24, 29;
Pickard vs. Sears, 6 Ad. & El. 469, 474;
Hawes vs. Marchant, 1 Curtis, C. C. 134, 144;
Dickerson vs. Duncan, 100 U. S. 578, 580.

In the case at bar there was no change of position by the government as the result of the appellant's inaction or silence; on the contrary, the government's position remained unchanged before and during the litigation and it is still unchanged.

(b) We submit that the cases of *Glavey vs. United States*, *supra*, and *United States vs. Andrews*, 240 U. S. 90, are conclusive on the question of estoppel.

Those were salary or compensation cases in which the government sought to apply the principle of estoppel against the officials who yielded to the actions of their superior officers on the subject of compensation and did not protest, but this Court held that each was entitled to his statutory compensation and was not estopped by his silence or inaction. In the *Andrews* case (p. 95) this Court said:

"The basis of the ruling in the *Glavey* case was the right of the official to rely upon the provisions of the statute and the resulting want of power to apply the principle of estoppel."

That is exactly what this appellant has been and is doing in the case at bar.

(c) The Court below (R. 22) cites *United States vs. Garlinger*, 169 U. S. 316, 322, as in support of its views.

That case was fully considered in *Whiting, Adm.x. vs. United States*, 35 Ct. Cls. 291, 301, 302. Whiting was an employee in the Coast Survey on a salary of \$2,400 a year until August 18, 1894, when the Secretary of the Treasury reduced it to \$1,600 *per annum* (p. 299). The action was to recover the difference in salary upon the theory that the salary was fixed by statute, and that the Secretary had no power to reduce it below \$2,400 *per annum* (p. 299). The government contended that the decedent accepted the reduced salary without objection and was thereby estopped to claim the difference mentioned (p. 299) on the authority of the *Garlinger* case (p. 301), but the Court of Claims, speaking through Judge Weldon, differentiated the two cases in reasoning that is clearly applicable to the case at bar (pp. 301, 302) because in the *Garlinger* case the plaintiff based his action on a *regulation* which he contended created a contract by implication, whereas the *Whiting* case was predicated on a *statutory right*, which is exactly the situation in the instant case.

The Whiting estate recovered judgment for the full amount sued for.

The decision in the *Whiting* case is in complete harmony with the decisions of this Court in the *Glavey* case and the *Andrews* case, *supra*. While the *Garlinger* case is not mentioned in those cases, yet they were decided on grounds that clearly differentiate them from that case, and as clearly include the present case in their doctrine.

We submit that the *Garlinger* case is not in point for any purpose whatever in the case at bar.

III.

The findings and opinion of the Court below.

The Findings.

An examination of the findings and opinion of the Court below will disclose a number of inconsistencies. It is deemed advisable to discuss the argument of the Court below and to point out, as we proceed, the inconsistencies in the findings and opinion.

Before proceeding with such discussion, however, it may be advisable to refer to the seeming importance attached by the Court below to the "class" designations by numbers of the inspectors when referring to their appointments.

(a) All through the findings, the terms "Class 1," "Class 2," and "Class 4" are used, and the Court below has apparently proceeded upon the theory that inspectors are divided into classes by statute. Such is not the fact. The use of "class" designations was begun by the Treasury Department more than a half century ago. These "class" designations merely indicate the amount of salary paid to the particular inspector, as the public records disclose.

Prior to the Act of March 4, 1909, inspectors in the small seaboard and interior ports received a com-

pensation of \$3 *per diem* under Section 2733 of the Revised Statutes. These men were designated as "Class 1." In the larger seaboard ports, with the exception of New York, the inspectors received \$4 *per diem*, pursuant to the Act of April 29, 1864 (c. 71, 13 Stats. 61), and the Act of July 23, 1866 (c. 208, Sec. 9, 14 Stats. 208). These inspectors were designated as "Class 2." The inspectors at the Port of New York received \$5 *per diem*, pursuant to the Act of December 16, 1902 (c. 2, 32 Stats. 753), and the Act of June 30, 1906 (c. 3912, 34 Stats. 636), and were designated as "Class 4." These "class" designations are used by the Treasury Department and the Civil Service Commission merely for convenience and cannot and do not have any effect upon the right of these inspectors to claim their *statutory salaries*. As new grades of inspectors were created, following the reorganization in the Port of New York, July 1, 1910, some at \$4.50 *per diem*, some at \$5.50 *per diem*, and others at \$6 *per diem*, it became necessary to use additional class designations. The \$6 inspectors were designated as "Class 5" (R. 10, Finding VI). With this explanation, further reference to the class designations is deemed unnecessary.

(b) Under Finding III, R. 7, it appears that appellant Ryan received the sum of \$2,428 during the period from April 16, 1910, to October 10, 1919, as additional compensation under the Act of February 13, 1911. This additional compensation was paid to Ryan by the steamship companies for overtime services required of him by the Collector of Customs. This sum of money was not paid to Ryan by the government

as there is no provision under the law for the payment of overtime to customs inspectors by the government. The Act of February 13, 1911 (Sec. 5, c. 46, 36 Stats. 899-1001), requires steamship companies to pay customs inspectors for all overtime services rendered at the request of the companies.

(c) In Finding V, R. 8, appears a statement (near the bottom of the page) that it is not shown how many of the inspectors received the additional dollar per day for service at unusual hours, or in what amount, from October 1 to December 31, 1905. In Finding VI, R. 9, it appears that all the inspectors at the port of New York received the additional dollar *per diem* during the aforesaid three months and without regard to whether or not they had rendered services at unusual hours. They received this dollar *per diem* compensation under the provisions of the Deficiency Acts mentioned in the said finding.

It appears from Finding VI, R. 9, that all the inspectors at the port of New York, prior to the plaintiff's appointment and after the passage of the Act of December 16, 1902, had received \$5 *per diem*. It appears in Finding IV, R. 7, that prior to the passage of the Act of 1902 and on and after the Act of April 29, 1864, all of the inspectors in the Port of New York had received \$4 *per diem*. The query naturally arises as to where can the authority be found for the appointment of appellant Ryan on April 16, 1910 at \$4 *per diem*.

In Finding VI, R. 9, (last sentence at bottom of the page), the Collector of the Port, it appears, wrote to the Secretary of the Treasury, in recommending

the classification of July 1, 1910, heretofore mentioned, and said:

"I believe that \$5.00 *per diem* is too liberal a salary for a young man just entering the inspectors' corps without any particular knowledge of customs or experience in the duties of inspector * * *."

It thus appears that the Collector undertook to set up his judgment against the judgment of Congress, and here is the real reason for the appointment of Ryan and other inspectors at a salary less than that provided by the statute. If it were desired to classify the inspectors into grades, the Collector had the power to grade them from a \$5 minimum to a \$6 maximum, according to their several abilities, and no one could have found fault with his classification. The difficulty arose out of the Collector's endeavoring to supersede the judgment of Congress with his own judgment. It may be well to note in passing that the findings show that appellant Ryan was first appointed to the customs service on April 13, 1899 (R. 7). Thus he had completed eleven years of service before his appointment as inspector.

(d) Finding IX, R. 11, states that the Treasury Department had always construed the various acts with reference to the salaries of inspectors of customs as authorizing a classification thereof. This finding is diametrically opposed to Finding IV, R. 7, wherein it appears that *all* inspectors at the port of New York received \$4 *per diem* after the Act of April 29, 1864, and to Finding VI, R. 9, that *all* the inspectors at the port of New York had received \$5 *per diem* after the Act of December 16, 1902. The learned Court below

was probably confused by the class designations heretofore referred to and which, as we have explained, merely indicate the amount of salary received by the inspectors so designated.

The Opinion.

Reference has been heretofore made in the statement of facts as to the reasons for the various petitions filed herein, and particularly as to the reason for reducing the appellant's claim from \$2 *per diem* to \$1 *per diem* following the decision of this Court in the Cochnower case. It is therefore unnecessary to refer further to the opening statement of the Court below in its opinion. That opinion was written by Downey, J., who, while Comptroller of the Treasury in 1914 as we have heretofore shown, had reviewed a disallowance of the auditor of the Treasury Department of a similar claim.

(e) On page 14 of the Record, in discussing the Cochnower case, the Court below takes the view that this Court regarded that case as one involving simply a reduction of salary. The Court below draws a distinction between the fact that Cochnower was appointed prior to the Act of March 4, 1909, while the appellant, in the case at bar, was appointed after that day; that Cochnower suffered a reduction in salary but that appellant was originally appointed at \$4 *per diem*. The Court then goes on to say that these stated differences seem to be material ones. This argument overlooks the decision of this Court in the Cochnower case that there was no power in the Secretary of the Treasury to *reduce the salary of the office* held by Coch-

nower. Of course, this Court never intended to hold and did not hold that there was no power in the Secretary to *reduce* Cochnower. As we have heretofore pointed out, counsel for Cochnower conceded that there was no question of the right of the Secretary to reduce him to a clerkship, to a messengership, or to any other position deemed advisable. This argument also overlooks the fact that the Cochnower case was prosecuted upon the sole ground that Cochnower held an office, the salary of which had been fixed by law at \$5 *per diem*, and that there was no power in the administrative branch of the Government to reduce the salary of this office without legislative permission. Ryan was appointed to the *same office* and should have received the compensation attached by law thereto.

(b) We are unable to follow the Court below in its reasoning on page 14 of the Record, for it seems that the Court argues directly against its own contentions. The concluding sentence of the Court's opinion on that page is:

"While it was held in the Cochnower case that the Secretary of the Treasury had no right to reduce Cochnower's compensation from \$5.00 to \$4.00 per day, the holding was apparently upon the theory *that the statutory compensation of an inspector was \$5.00 per day, which the Secretary had no right to reduce.*" (Italics ours.)

The forgoing sentence states precisely the contention of Cochnower's counsel that was sustained by this Court. If it be true, and this Court has said that it is true, that the statutory compensation of an inspector in New York was \$5 per day, then it irresistibly fol-

lows that Ryan, who was indisputably lawfully appointed to the office of inspector, did not receive all the compensation belonging to him.

At the top of page 15 of the Record appears a statement by the Court below that it has no desire to take issue with this Court in its decision of the Cochnower case. In the last paragraph of that page the opinion, however, says:

"It seems to us that the change in Cochnower's salary from \$5.00 to \$4.00 *per diem* is not, under the circumstances, to be *regarded as a decrease in a statutory salary*, but rather a demotion in a classified service." (Italics ours.)

It thus appears that the Court below does take issue with the decision of this Court in the Cochnower case. About the middle of page 15 appears this statement in the opinion:

"The change in Cochnower's salary from \$5.00 to \$4.00 per day is treated as a reduction of a statutory salary and upon that basis may be conceded to have been unauthorized."

The inconsistencies in the foregoing quotations are manifest, and need no comment.

At the middle of page 15 appears a quotation from the decision of this Court in the Cochnower case with reference to the power of classification. Again, it is necessary for us to state that this Court squarely held that if there was such a power of classification given in the Act of 1909, such classification could be accommodated between the maximum amount named in the statute (\$6.00) and the minimum amount (\$5.00) which this Court held to be the statutory salary prior to the passage of that Act.

The Court below assumes (bottom of page, R. 15) that there was authority to classify at \$4, \$5 and \$6 *per diem* despite the decision of this Court that \$5 was the statutory salary and therefore the minimum, and the learned Court below goes on to argue that the appointing power must have had authority to demote from the \$5 to the \$4 class and that *such demotion was not a reduction in a statutory salary*. Again, the Court below takes issue with this Court and holds that there was no reduction in the statutory salary of the office held by Cochnower.

(h) On page 16 of the Record, the Court below seems to take the view that the Act of 1902 must have fixed by its terms, the salary of inspectors at \$5 *per diem*, if the contention of the appellant in the case at bar is to prevail. The Act of 1902, as we have heretofore pointed out, may not have been sufficient in itself to increase the salary of the office of an inspector of customs at the port of New York without some affirmative act on the part of the Secretary of the Treasury, but the latter did act pursuant to the statute, and increased the pay of *all* the inspectors at that port to the maximum named therein, \$5 *per diem* (Finding VI, R. 9). The salary then became fixed at \$5 and Congress expressly ratified and confirmed this fixation by the Acts of 1906 and 1907, as we have seen.

On page 17 of the Record, middle of the page, appears the following statement in the opinion:

"To sustain the theory that this might not be done and therefore to sustain the plaintiff's claim, it is necessary to revert to the preceding Act of 1902; conclude that that Act fixed

the salary of inspectors at \$5 per day; that all inspectors were entitled to receive that salary and that the Act of 1909 *conferred no power to reduce, by reclassification or otherwise, the salary thus fixed.*" (Italics ours.)

The part that we have italicized in the foregoing quotation raises again the precise question that this Court settled in the Cochnower case; namely that if there was power of classification it was to be exercised between the minimum of \$5, the fixed salary, and \$6, the maximum authorized under the Act of 1909.

(i) At the bottom of page 17 of the Record, the Court below continues to maintain its contention that there was no fixed salary of \$5 *per diem* and cites the Act of March 3, 1881 (21 Stats., 429), which authorized the Secretary of the Treasury to appoint inspectors of customs at less than \$3 per day when, in his judgment, the public service would permit. The Court below overlooks the fact that the later statutes of 1902, 1906 and 1907, applying only to the port of New York, render inapplicable the Act of 1881, which was manifestly passed to permit the Secretary to appoint inspectors in certain small ports at less than the amount fixed in Section 2733 of the Revised Statutes. Whatever may be the Secretary's powers with regard to the salaries of customs inspectors in other ports, the Acts of 1902, 1906 and 1907 fixed the salary of the New York inspectors at \$5 and the Act of 1909, general in its scope, permitted the Secretary to increase this amount as he saw advisable, not to exceed \$6. Furthermore, this Court had before it and considered the Act of 1881 in the Cochnower case (Cochnower, R. 9).

(j) Near the middle of page 18 of the Record appears the following from the opinion:

" * * * The Secretary, under the authority of that Act (referring to the Act of 1902), did appoint many, *and for ought we know* all of the inspectors then 'Class 2 at \$4.00 *per diem*, inspectors Class 4, \$5.00 *per diem*.'" (Italics ours.)

Finding VI, R. 9, recites that *all* inspectors at New York received \$5 *per diem* under the Act of 1902.

(k) In discussing the Deficiency Acts of 1906 and 1907, the Court below (R. 19, middle of the page) says:

"Just what the situation to be met by the Deficiency appropriation was, is not clearly shown, and we are not informed whether payment was to be made to all inspectors or in the same amounts or upon a basis of equalization."

Finding VI, R. 9, states that the compensation of New York inspectors for the three months of October, November and December, 1905, were adjusted by the Deficiency Acts of 1906 and 1907. The Court had before it the department reports on this point and found the facts accordingly. It thus appears that the Court had evidence before it showing that each of these New York inspectors received \$1 *per diem* for the three months that he suffered the demotion, and it so found.

(l) On page 21 of the Record, the Court below, in its opinion, points out that under the Civil Service law a classified employee in Class 2 was entitled to receive a salary of \$1,400 per year minimum and not

more than \$1,600, and the argument is advanced that because Ryan was classified as inspector, Class 2, he could not receive a salary in excess of \$1,600 upon his appointment as inspector. The Court *confuses the classification* of the clerical employees in the Departments as provided in Revised Statutes, Sections 163 and 167, and the classification of inspectors growing out of Department practice alone. The foregoing sections of the Revised Statutes provide for the salaries of clerks and other employees in the Departments alone, and fix \$1,800 as the salary for Class 4, \$1,600 for Class 3, \$1,400 for Class 2, and \$1,200 for Class 1. No other classes are provided for. It will be remembered that \$6 inspectors are known as *Class 5*. They receive \$2,190 per annum. Inspectors of customs are not numbered by the same system of classification, as heretofore explained. In fact, the inspectors of customs are not clerks or employees of the Departments so as to come within the foregoing provisions of the Revised Statutes. They are officers in the customs service.

Stewart vs. United States, 17 Howard 116, 127, 128;

United States vs. McEwan, 44 Fed., 594;

Act of July 31, 1789, c. 5, Sec. 29, 1 Stats., 45.

Congress, and the courts as well, have always made clear distinctions between clerks and employees on the one hand, and officers of the United States on the other; *inspectors belong in the latter category*. That is settled law. The only similarity between clerks under the Civil Service rules and inspectors under department practice is that both are required to pass

a first grade examination before being eligible for appointment. It would thus seem that the learned Court below fell into the error of assuming that an inspector, Class 2, was under the same salary limitation as a clerk, Class 2, under R. S. 167 and the Civil Service regulations.

IV.

The effect of the executive order of March 3, 1913.

The Court below finds (Finding VII, R. 10) that the reorganization of the customs service in New York that became effective July 1, 1910, was continued after the reorganization of the customs service by the President under authority of the Act of August 24, 1912, effective July 1, 1913 (c. 355, 37 Stats. 434). The following finding, however (R. 11), shows clearly that the Treasury Department has always construed and treated the estimate annexed to the Executive order as an estimate only, and therefore subject to variance each succeeding year. As the "estimate" that was annexed to the Executive order (U. S. Comp. Stats. 1913, 5327), set forth the various numbers of inspectors of each class, and their respective salaries, it cannot be argued that these classes or salaries were intended to be made permanent by the Executive order. The Treasury Department has *never so regarded it*, as Finding VIII shows. Only the executive order proper became permanent law, and in no part of the order can be found any reference to the salaries of

inspectors. The estimates annexed to the order have been varied from year to year. The estimate annexed to the order provided for some 90 inspectors at \$6 *per diem*, 216 at \$5, and 113 at \$4 *per diem* in the port of New York. Succeeding estimates submitted by the Secretary changed both the total number of inspectors and the number of each grade. At the present time, there are not more than 15 or 20 \$4 inspectors, all the others having been promoted to \$5, \$5.50 or \$6.00. It thus appears that the Executive order has no effect whatever upon the rights of the appellant.

We submit that the judgment of the Court below should be reversed and that the appellant should have judgment for \$1.00 *per diem* from April 16, 1910 to and including October 10, 1919, 3465 days, amounting to \$3,465.00, as prayed for in his petition.

Respectfully submitted,

WILLIAM E. RUSSELL,
LOUIS T. MICHENER,
PERRY G. MICHENER,
Attorneys for Appellant.

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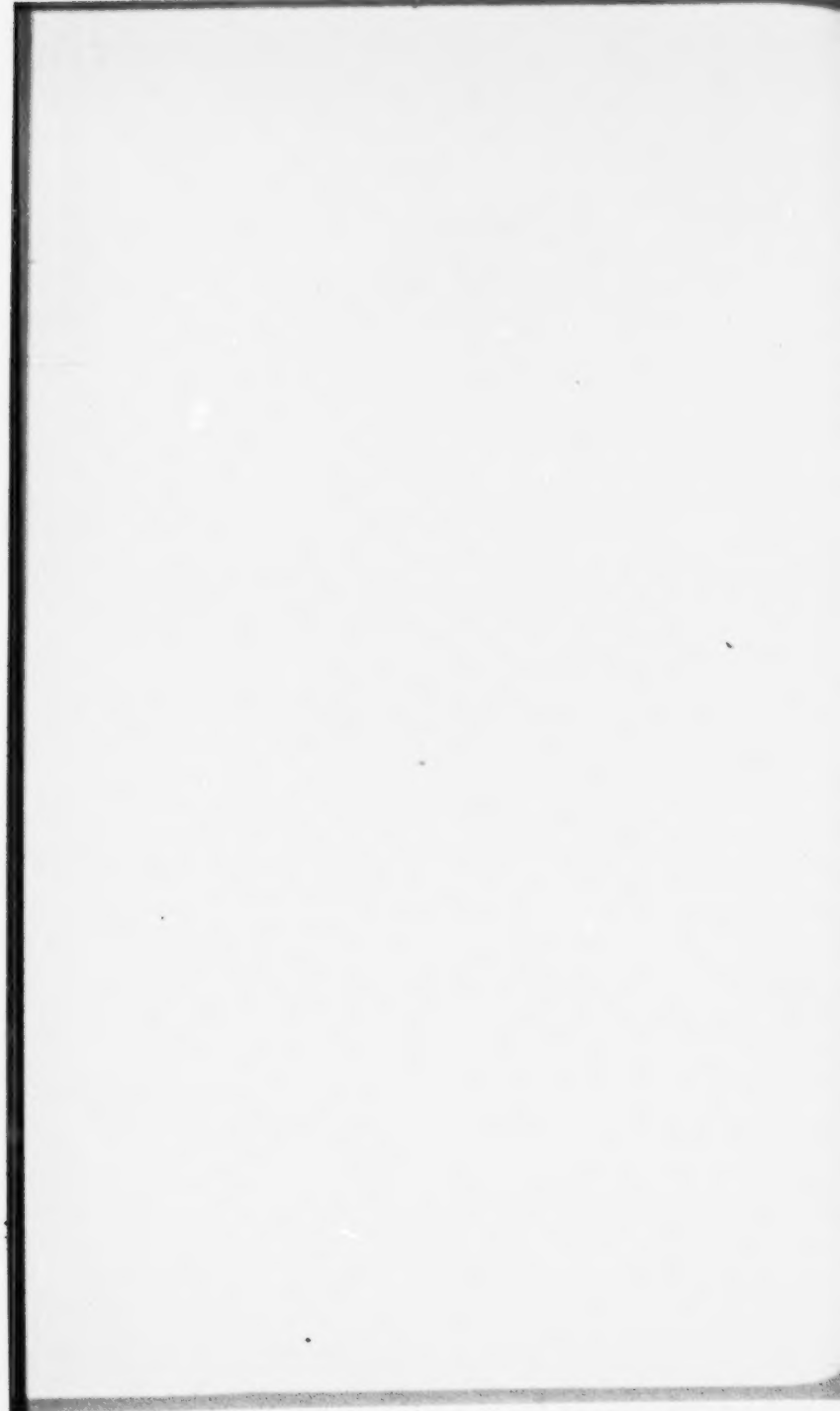
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In the Supreme Court of the United States

OCTOBER TERM, 1922.

THOMAS F. E. RYAN, APPELLANT,	} No. 64.
v.	
THE UNITED STATES.	

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The plaintiff, Thomas F. E. Ryan, is employed as an inspector in the customs service at the port of New York, and has been so employed since his appointment as such became effective on April 16, 1910. Prior to his appointment as inspector he was employed as a clerk in the customs service at the port of New York. On April 9, 1910, he was appointed by the Secretary of the Treasury an inspector, class 2, at \$4 per diem, to take effect upon execution of the oath of office. Mr. Ryan executed his oath as inspector, class 2, on April 16, 1910, and his appointment became effective from and after that date. (R. 7, F. II.)

On October 9, 1919, appellant was promoted to inspector, class 4, at \$5 per diem, effective from date of execution of oath. Appellant's oath was executed and the appointment became effective October 10, 1919. (R. 7, F. II.)

From April 16, 1910, the date when his original appointment became effective, to October 10, 1919, the date when his promotion became effective, appellant was paid at the rate of \$4 per diem. Aside from the additional compensation paid in pursuance of the provisions of the act of February 13, 1919, for overtime, appellant received at no time during said period more than \$4 per diem. (R. 7, F. III.)

The appellant contends that he should have been appointed on April 16, 1910, at \$5 per diem and that he should have received \$5 per diem during the entire period from April 16, 1910, to October 10, 1919.

A petition was accordingly filed in the Court of Claims on April 13, 1916, which was subsequently amended and the amended petition filed November 12, 1920, claiming the difference between \$4 per diem and \$5 per diem from April 16, 1910, to and including October 10, 1919, an aggregate sum of \$3,465. (R. 1-5.)

At no time during appellant's employment as an inspector, class 2, at \$4 per diem, and prior to filing his suit in the Court of Claims, did appellant make any objection to or protest against the amount paid him as compensation, nor did he make any demand for any other or greater compensation than that paid him. (R. 11-12, F. XII.)

The Court of Claims found that the plaintiff was not entitled to recover any part of the amount claimed and that the petition should be dismissed. (R. 12.) An order dismissing the petition was entered on February 21, 1921. (R. 22.) From the judgment of the Court of Claims appellant appeals to this court.

The importance of this case is not measured alone by the amount involved in plaintiff's petition. There are a large number of similar cases dependent upon the decision in this case. Between the date of appellant's appointment on April 16, 1910, and June 30, 1910, some 25 inspectors of customs at the port of New York were appointed in class 2, at \$4 per diem. (R. 9, F. VI.) The reorganization of the Customs Service was effected by the Secretary of the Treasury July 1, 1910. This reorganization provided for the appointment of inspectors, class 2, at \$4 per diem, and pursuant thereto 74 inspectors were appointed in this class at that compensation. (R. 10, F. VI.) The appointment of appellant and others appointed prior to July 1, 1910, marked their entrance into the service as inspectors, class 2, and they were not reappointed under the reorganization but remained in the position to which appointed as inspectors, class 2, under their original appointments. (R. 10, F. VI.)

ARGUMENT.

I.

The minimum compensation to be paid to customs inspectors, class 2, was within the discretion of the Secretary of the Treasury.

~~But one question is involved in the determination of this appeal, namely, whether at the time of appellant's appointment in the Customs Service as an inspector, class 2, at \$4 per diem, the law then in force fixed a compensation of \$5 per diem for such position. If a minimum salary of \$5 was provided by law for inspectors, class 2, at the time of appellant's appointment, then it must be conceded that he is entitled to that compensation. (*United States v. Andrews*, 240 U. S. 98; *Glavey v. United States*, 182 U. S. 595.) If no such minimum salary was fixed by statute, then it must be conceded that appellant's case falls to the ground; for his whole case rests on that one point.~~

All laws prior to the enactment of the Revised Statutes of 1878 relative to salaries of inspectors fixed only the maximum salary which might be paid them and left the minimum compensation to the discretion of the Secretary of the Treasury. Such laws were a limitation on the power of the Secretary of the Treasury rather than a statutory fixing of the salaries of inspectors.

The first statute to fix the compensation of inspectors in the customs service is section 2733 of the Revised Statutes, which fixed the salary of inspectors

at \$3 per diem, followed by section 2737, Revised Statutes, which authorized the Secretary of the Treasury to increase such compensation by the addition of \$1 per day when he considered it advisable so to do. Sections 2733 and 2737, Revised Statutes, follow:

SEC. 2733. Each inspector shall receive, for every day he shall be actually employed in aid of the customs, three dollars; * * *.

SEC. 2737. The Secretary of the Treasury may increase the compensation of inspectors of customs in such ports as he may think it advisable so to do, and may designate, by adding to the present compensation of such officers, a sum not exceeding one dollar per day.

The above quoted statutes are plain and free from ambiguities. They are related statutes and therefore must be read together. When so read, they can be construed to mean but one thing, namely, that an inspector's compensation was fixed at \$3 per diem for such days as the inspector might be called upon by the collector to render service, with discretionary power in the Secretary of the Treasury to increase the regular statutory compensation by the addition of \$1 per day. However, the basic salary, and in this case the minimum salary, was fixed at \$3 per day. Unless the Secretary of the Treasury chose to exercise the discretionary power granted him, the statutory salary was to be \$3 per day. This is the *first and only instance of a fixed minimum salary for inspectors to be found in the statutes.*

However, Congress deemed it advisable to restore the Secretary's discretionary power in reference to the minimum salary to be paid inspectors, and section 2733 of the Revised Statutes was accordingly repealed, in so far as it fixed the minimum salary of inspectors, by a provision in the deficiency appropriation act of March 3, 1881 (c. 132, 21 Stat. 414, 429), which reads:

Provided, That hereafter the Secretary of the Treasury may appoint inspectors of customs at a compensation less than three dollars per day when, in his judgment, the public service will permit.

This provision restored to the Secretary of the Treasury his discretionary power over the minimum salary to be paid inspectors, which he possessed prior to the enactment of section 2733 of the Revised Statutes, but left the maximum salary at \$3 per day with an addition of \$1 at the discretion of the Secretary, thereby allowing a maximum salary of \$4 per diem, and a minimum salary at the discretion of the Secretary.

Even if the Secretary of the Treasury may have increased all inspectors at the port of New York City from \$3 per diem to \$4 per diem, by granting the additional \$1 per day authorized by section 2737, Revised Statutes, the provision of the act of 1881, above quoted, specifically authorizes him to appoint inspectors at less than the maximum salary already being paid to other inspectors employed at that port.

The authority given the Secretary of the Treasury to fix the minimum entrance salary for inspectors has never been taken away.

The law remained, as above stated, until the enactment of the act of December 16, 1902 (c. 2, 32 Stat. 753), entitled "An act regulating the duties and fixing the compensation of customs inspectors at the port of New York." That act provided:

That the Secretary of the Treasury is hereby *authorized* to increase the compensation of inspectors of customs at the port of New York *as he may think advisable and proper*, by adding to their present compensation a sum not exceeding one dollar per day, which *additional* compensation shall be for work now performed by them at *unusual* hours, for which *no compensation is now allowed*, and shall include work performed by said inspectors at night in examining passengers' baggage, and also as reimbursement for expenses incurred by them for meals and transportation while in the discharge or performance of their official duties. (Italics supplied.)

The above quoted statute is permissive in form. It permits the Secretary to increase the compensation of those inspectors who perform extra work and who render such exceptional service as to warrant the Secretary in granting the extra compensation. The very terms of the statute itself shows the purpose of the act; that the extra compensation granted is to pay for the extra service rendered and to cover the expenses incurred by the inspectors who are compelled to work overtime. This additional compensation was to be

granted only in the discretion of the Secretary of the Treasury, "as he may think advisable and proper."

The act of 1902, *supra*, taken in connection with section 2737, Revised Statutes, authorizes a maximum compensation of \$5 per day. The minimum compensation at which the Secretary may appoint inspectors was left unchanged.

The Court of Claims found that the Secretary of the Treasury on January 5, 1903, by an official order, promoted all inspectors of class 2, \$4 per diem, at the port of New York, to inspectors, class 4, \$5 per diem. (R. 8, F. V.) The court also found that immediately prior to appellant's appointment as an inspector, class 2, at \$4 per diem, and continuously since the order of January 5, 1903, with the exception of a period of three months, all inspectors of customs at the port of New York received \$5 per diem. (R. 9, F. VI.)

While it is clear, therefore, that at the time of appellant's appointment as an inspector, class 2, at \$4 per diem, all other inspectors already employed at the port of New York were receiving \$5 per diem as inspectors, class 4, it does not necessarily follow that appellant's appointment as an inspector entitled him to the same compensation then being paid to more experienced employees. The Secretary's discretionary power over the minimum entrance salary of inspectors had not been taken from him, nor in any way modified by the act of 1902.

The next statute material to our inquiry is that of the act approved March 4, 1909 (c. 314, 35 Stat.

1065) entitled "an act fixing the compensation of certain officials of the customs service." That act, so far as it relates to the compensation of customs inspectors, provides:

SEC. 2. That the Secretary of the Treasury be, and he is hereby, authorized to increase and fix the compensation of inspectors of customs, *as he may think advisable*, not to exceed in any case the rate of six dollars per diem, and in all cases where the maximum compensation is paid no allowance shall be made for meals or other expenses incurred by inspectors when required to work at unusual hours.

* * * * *

SEC. 8. That all laws and parts of laws inconsistent with this act are hereby repealed. (Italics supplied.)

The act of March 4, 1909, *supra*, is not mandatory and does not compel the Secretary of the Treasury to employ inspectors at \$6 per day, the maximum compensation authorized therein, nor at \$5 per diem, the compensation to which appellant claims he is entitled. The act of 1909, like the act of 1902, *supra*, does not attempt to fix a minimum compensation, nor does it fix any per diem compensation which *must* be paid to inspectors employed at the port of New York. It does authorize the Secretary of the Treasury to increase the compensation of inspectors "as he may think advisable," limited, however, to \$6 per diem. It gives to the Secretary discretionary power to "fix" the compensation. When the Secre-

tary has exercised that authority and *fixed* the compensation of certain inspectors, whether at \$4, \$5, or \$6 per diem, the compensation of such inspectors has become *fixed*, and in effect has become statutory. This is the substance of the decision of this court in the case of *Cochnowar v. United States*, 248 U. S. 405.

There is nothing in the act of 1909, *supra*, nor in the decision of this court in the *Cochnowar case* which takes away the discretionary power theretofore lodged in the Secretary of the Treasury over the minimum compensation to be paid to an inspector at the time of his appointment.

Had the Secretary of the Treasury, pursuant to the act of 1909, issued an order that all inspectors of class 2 should be paid \$5 per diem, thereby fixing the compensation of that class, and subsequently had appointed appellant an inspector, class 2, appellant might have some ground on which to base his claim. The Secretary, however, did nothing of that kind. On the contrary, he prepared to exercise the discretionary powers granted by this statute by effecting a reorganization of the inspection force at the port of New York by which some inspectors were to be paid at the rate of \$6 per day, while others were to receive less compensation. The reorganization plan was formulated but did not become effective until July 1, 1910, some two and a half months subsequent to the appointment of appellant. The appointment of Ryan and others in April, 1910, as inspectors, class 2, at \$4 per diem, marked their entrance into

the service in that class, and they were not reappointed under the reorganization as inspectors of class 2, but remained under their original appointments. (R. 10, F. VI.)

In the *Cochnowar case*, an attempt was made to reduce Inspector Cochnowar from \$5 per diem, the compensation which he had been receiving, to \$4 per diem, as an inspector, class 2. This court held that while the act of 1909, authorized the Secretary to "increase and fix" the compensation of inspectors, it did not authorize him to *decrease* their compensation where their class and compensation had theretofore been established.

It is apparent, therefore, that the act of 1909 in force at the time of appellant's appointment did not fix a minimum salary to be paid inspectors upon their entrance into the service. Neither did the act of 1902, as has heretofore been shown, limit the discretion of the Secretary in regard to minimum salaries to be paid inspectors at the time of their appointment.

Appellant was employed as an inspector, class 2, at \$4 per diem. No inspector of class 2 has ever received more than \$4 per diem at the port of New York. When, under the authority of the act of 1902, inspectors were advanced to \$5 per diem, by paying to them the additional \$1 per diem authorized by that act, they were promoted to inspectors, class 4, and as such inspectors of class 4 paid \$5 per diem.

Appellant was not appointed an inspector, class 4, until October 10, 1919, and when so appointed

he received the compensation of \$5 per day designated for that class. The act of 1909 operated only upon those inspectors already in the service and authorized the Secretary to "increase and fix" their salaries. There is nothing in that statute relating to the minimum salary to be paid inspectors upon appointment, or fixing a rigid compensation for inspectors of any class. There is nothing in that act, therefore, to sustain appellant's theory that the salary or compensation of inspectors of class 2 was fixed at \$5 per diem.

Neither does the act of 1902 attempt to classify inspectors by grades and fix the salaries to be paid for each grade. Even though other inspectors, already in the service at the time of appellant's appointment, were receiving \$5 per day, because of the designation of the Secretary of the Treasury pursuant to the act of 1909, appellant would not be entitled to such increased compensation until so designated by the Secretary.

Appellant's claim for compensation at \$5 per diem instead of \$4 per diem rests on the mere fact that some other inspectors were being paid \$5 per diem and that, therefore, appellant should have the same compensation. If this ridiculous claim should be allowed on the theory set forth, the same theory would be advanced by employees of other branches of the Government service. A large number of employees throughout the Government service would no doubt make claims for increased compensation based upon the same unsound, unjust, and inequitable

ground that is now advanced by appellant, namely, that they should receive the same compensation as that allowed to the highest paid employees performing a similar kind of work, regardless of length of service, experience, or efficiency.

Had the Congress intended to take away from the Secretary of the Treasury the power to fix the compensation to be paid inspectors upon their appointment in the service it would undoubtedly have said so in plain and unmistakable language.

All of the acts heretofore referred to, including sections 2733 and 2737, Revised Statutes, were superseded by the act of August 24, 1912 (c. 355, section 1, 37 Stat. 434), by which the President was authorized to reorganize the Customs Service. (6 Comp. St. 1916, p. 6585.) As authorized by the act of 1912, the President submitted his plan of reorganization in a message to Congress, dated March 3, 1913, and the same became effective July 1, 1913. (6 Comp. St. 1916, p. 6513.)

In the estimate accompanying the message, and which was adopted and appropriations made in accordance therewith for the fiscal year ending June 30, 1914, there will be found the following numbers of inspectors employed at the port of New York, together with their estimated compensations, namely:

90 inspectors, at \$6.00 per day.

6 inspectors, at \$5.50 per day.

216 inspectors, at \$5.00 per day.

113 inspectors, at \$4.00 per day.

4 inspectors, at \$3.00 per day.

The foregoing is instructive, although not necessarily material to the question to be decided, in that it shows that 113 inspectors were then being employed or were intended to be employed at \$4 per diem, while 4 inspectors were employed or intended to be employed at \$3 per diem. The Court of Claims found (R. 10, F. VII) that the organization of the Customs Service effected pursuant to the act of March 4, 1909, was continued after the reorganization of the Customs Service by the President under authority of the act of August 24, 1912, *supra*.

It can be safely assumed, therefore, that all of the inspectors named in the estimate attached to the President's plan of reorganization were then employed at the salaries named in the estimate. That being true, the estimate can be taken at least as a part of the plan of reorganization, and was in fact the basis upon which the inspectors were to be paid for the fiscal year ending June 30, 1914. It shows also the interpretation put upon previous acts by the Secretary of the Treasury as to his authority to employ inspectors at less than the maximum salaries authorized by the acts of December 16, 1902, and March 4, 1909, *supra*.

Appellant lays great stress upon the language used in the deficiency appropriation acts of June 30, 1906 (34 Stat. 636), and March 4, 1907 (34 Stat. 1343), as defining the legal compensation to be paid to inspectors of customs.

As a matter of fact the language used in those statutes have no bearing upon the question before this court. The facts which made necessary the deficiency appropriations referred to are that certain inspectors at the port of New York were being paid at the rate of \$5 per diem as inspectors, class 4. They had been so designated and paid prior to October, 1905. The Secretary of the Treasury ordered these inspectors, class 4, reduced to inspectors, class 2, at \$4 per diem, and they were reduced and paid accordingly for the months of October, November, and December, 1905. On January 8, 1906, the Secretary ordered that these same inspectors of class 2, be restored to inspectors, class 4, at \$5 per diem. (R. 8, F. V.) There were 331 inspectors, class 4, reduced to class 2, and the same 331 inspectors, class 2, were restored to class 4.

Subsequently the Congress, by the deficiency acts of June 30, 1906 and March 4, 1907, *supra*, appropriated the difference between \$4 per diem and \$5 per diem for the months of October, November, and December, 1905. The deficiency acts referred to read as follows:

To pay the inspectors of customs of the port of New York the difference between the per diem salary of four dollars paid them during the months of October, November, and December, 1905, and their proper per diem salary for the same period (five dollars per diem) in accordance with the act of Congress approved December 16, 1902, thirty-

one thousand dollars or so much thereof as may be necessary. (Act June 30, 1906.)

To enable the Secretary of the Treasury to pay to certain inspectors of customs of the port of New York the difference between the per diem salary of four dollars paid them during the months of October, November, and December, 1905, and their proper per diem salary of five dollars for the same period, nine hundred forty dollars. (Act March 4, 1907.)

Appellant attempts to construe the words "their proper per diem salary for the same period (five dollars per diem) in accordance with the act of Congress, approved December 16, 1902" as a legislative interpretation of the act of 1902, and as fixing a minimum salary for inspectors of customs. The language will bear no such construction. The 331 inspectors referred to had theretofore been designated inspectors, class 4, at \$5 per diem. The reduction in pay and consequent reduction in classification may have been unwarranted. Congress, believing that the inspectors should receive the difference between the former compensation and the reduced compensation appropriated an amount sufficient to pay such difference. In doing so it described the appropriation in the language above used, not as being the legal minimum salary, but as being the compensation which the 331 individual inspectors should have received for the period mentioned.

The Court of Claims in its opinion in this case referred to the reduction and subsequent restoration of the 331 inspectors and the deficiency appropriation acts to pay the difference in compensation as follows (R. 19):

From some standpoint not shown the Secretary evidently concluded that he ought to adjust pay for this period on a \$5 per diem basis. As shown by official records he feared that if he made these payments from the current appropriation he would create a deficiency therein, and he thought it better to ask a deficiency appropriation for the purpose. If outside of the record, it does not do violence to our general, if not judicial, knowledge of such matters to assume that a provision in a deficiency bill appropriating a considerable sum of money to be paid to certain employees would not have gotten very far if upon its face it might not controvert the idea of a gratuity. Some reason must be given of what importance was phraseology when money was wanted. But further discussion is not justified. *We can not conclude that a plain, unambiguous act can be thus changed in its whole import by an assumed legislative construction for which there is no foundation.* (Italics supplied.)

It is submitted that the explanation given by the Court of Claims in reference to the above acts is the only correct and reasonable one.

The decision of this court in *Cochnowar v. United States* (248 U. S. 405), can not be said to be authority

against the Secretary of the Treasury to fix the per diem compensation of inspectors at the time of appointment, nor that he can not employ an inspector, class 2, at \$4 per diem, even though he may at that time have in his employ other inspectors of class 4, at \$5 per diem. In that case this court, citing the act of March 4, 1909, *supra*, said, (pp. 407-408):

Reverting then to the statute, we discover that it was at pains to express clearly the power to "increase." If it had been intended to give the power to "decrease"—an accurately opposite power—it would have been at equal pains to have explicitly declared it; and thus the unlimited discretion in the Secretary contended for by the Government would have been simply and directly conferred and not left to be guessed from a circumlocution of words or to be picked out of a questionable ambiguity.

* * * * *

It is, however, urged that the act implies minimum and maximum salaries, especially of inspectors, and also the power of classification of inspectors. We are not called upon to dispute it. The fact or the power does not enlarge the authority to increase salaries into an authority to decrease them. The power given can otherwise be accommodated.

In that case this court took under consideration only the question of the right of the Secretary, under the provisions of the act of March 4, 1909, *supra*, to reduce Cochnower from inspector, class 4,

to inspector, class 2, with a consequent reduction in pay from \$5 per day to \$4 per day. The Government based its case on the language of the act of 1909, and this court held that the act gave the Secretary no authority to decrease the compensation of those inspectors whose per diem compensation had theretofore been designated by the Secretary of the Treasury.

But Cochnower also claimed that the statute fixed the compensation of inspectors at \$6 per diem and that under the provisions of that statute he should have been increased from \$5 to \$6 per diem. He accordingly included in his petition filed in the Court of Claims a claim not only for the difference between the compensation of \$5 per diem, which he had theretofore received and the reduced compensation of \$4 per diem, but also between the pay at \$5 per diem and the maximum compensation of \$6 per diem, which he asserted he should have received under the provisions of the act of 1909. This latter claim was not allowed by this court. As was well stated by the Court of Claims in its opinion in this case (R. 16):

The situation is sufficiently met under the theory of that case when it is said that the act being permissive in its character authorized the Secretary of the Treasury in his discretion to increase salaries of inspectors to \$5 per diem, and when he had, as in the Cochnower case, exercised that discretion, Cochnower's salary then became fixed at \$5 per diem by virtue not alone of the statute but by virtue of the

exercise by the Secretary of the Treasury of the authority conferred upon him by the statute.

But appellant had never, during the time for which he claims additional compensation, been appointed an inspector, class 4, nor had the Secretary of the Treasury exercised his discretionary powers as to him and designated the compensation to be received by appellant other than \$4 per day. Again quoting from the opinion of the Court of Claims in this case:

To hold that from the time of his appointment in April, 1910, he was entitled to receive \$5 per diem compensation is to hold that he was then appointed an inspector, class 4, to which he was ineligible, and if he had been so appointed his appointment under the civil-service act would have been invalid. (R. 21.)

In the *Cochnowar case* the Secretary's discretionary powers over the compensation to be paid inspectors at the time of their original appointments was not considered. No consideration was given to the act of December 16, 1902, *supra*, nor to the specific authority granted the Secretary by the act of March 3, 1881, *supra*. In the latter act the Secretary was authorized to "appoint inspectors of customs at a compensation of less than \$2 per day." *That act was not repealed by either the act of 1902 or the act of 1909.*

All three of the acts above referred to were repealed by the act of August 24, 1912 (c. 355, sec. 1, 37 Stat. 434; (Comp. St. sec. 5327), and the message

of the President to Congress, dated March 3, 1913, submitted in accordance with the provision of said act. In the message referred to there was set out a plan of reorganization of the Customs Service, which was put into effect on July 1, 1913 (6 Comp. St. 1916, p. 6513, et seq.).

Even if it should be held by this court that appellant is entitled to the difference between \$4 per day which he received and the \$5 per day which he claims, the additional compensation can not be allowed him subsequent to June 30, 1913, when the reorganization of the Customs Service, authorized by the act of 1912, became effective, as that act impliedly repealed all former acts. This court so held in the *Cochnowar* case by allowing additional compensation to Cochnowar only to June 30, 1913, instead of for the full period claimed by him. (*Cochnowar v. United States*, 249 U. S. 588.)

Appellant attempts to draw a parallel between this case and that of *Adams v. United States* (20 Ct. Cls. 115; appellant's brief, p. 21). The two cases are easily distinguishable. Adams was appointed an inspector on May 8, 1874, at \$2.50 per diem, although at that time the statutory compensation of inspectors was fixed at \$3 per diem. (Sec. 2733, Rev. Stats.)

At the time of Adams's appointment as inspector, the act of March 3, 1881 (21 Stat. 429), permitting the Secretary to employ inspectors at less than \$3 per day, had not been passed.

In this case Ryan was appointed an inspector at \$4 per diem, subsequent to the enactment of the act of March 3, 1881, *supra*. There was, therefore, no restriction upon the minimum compensation at which the Secretary could employ inspectors. At the time of Ryan's appointment, the compensation of inspectors was not fixed at \$5 per day, either by the act of 1902 or by any other act. The Secretary still had discretionary authority over the minimum salary of inspectors given him by the act of 1881, *supra*.

The difference between the two cases is so apparent that it is not deemed necessary to argue the point further.

There can be little doubt but that the Secretary of the Treasury had the right under the law in force at the time of Ryan's appointment as an inspector, class 2, to employ inspectors in the customs service at any compensation which in his discretion he deemed advisable, not to exceed, however, the maximum compensation fixed at \$6 per diem by the act of March 4, 1909, *supra*. He not only had the inherent right possessed by every executive head of a Government department, where the compensation is not specifically fixed by statute, but he had the specific statutory right given him by the act of March 3, 1881. He exercised that right when he appointed Ryan an inspector, class 2, at \$4 per diem. Ryan accepted the office under the terms of the appointment and he can not now be heard to repudiate that acceptance.

II.

Appellant's acceptance of the appointment tendered him with knowledge of the compensation he was to receive, and his continuance in the position for a long term of years without protest, precludes him from claiming an additional compensation.

Appellant was tendered an appointment in the customs service as an inspector, class 2, at \$4 per diem, on April 9, 1910, to become effective on execution of the oath of office. He knew the terms of the offer and he accepted them. His execution of the oath as inspector, class 2, on April 16, 1910, evidenced his acceptance of the appointment. (*Glavey v. United States*, 185 U. S. 595, 604-5.)

The statutes authorizing the appointment of inspectors in the customs service have been construed by the Secretary of the Treasury whose duty it was and is to execute them. Construing the acts of December 16, 1902, *supra*, and March 4, 1909, *supra*, as permissive, in so far as they relate to the appointment of inspectors, the Secretary classified the inspectors into three classes with compensation at \$4, \$5, and \$6 per diem, respectively. Appellant was, therefore, appointed as a *day inspector*, class 2, at \$4 per diem. The fact that appellant was appointed an inspector, class 2, at \$4 per diem, the compensation assigned by the Secretary to that class, shows that the Secretary construed the law as permissive, authorizing the Secretary to establish different salaries for the different classes of inspectors. That a long

and uniform construction given a statute by the department charged with its execution will be given great weight, and unless obviously erroneous, will not be disturbed by the courts, has become well established. (*Swift v. United States*, 105 U. S. 691, 695; *United States v. Graham*, 110 U. S. 219; *United States v. Tanner*, 147 U. S. 661; *United States v. Alger*, 152 U. S. 384, 397.)

Appellant accepted the appointment without protest. He made no demand for an increase of salary or for the additional compensation which he now claims rightfully belonged to the office. From April 16, 1910, the date of his acceptance, to October 10, 1919, the date of his promotion to inspector, class 4, at \$5 per diem, he accepted the compensation tendered him without protest, and without complaint, thereby acquiescing in the interpretation given the law by the Secretary of the Treasury. On April 13, 1916, approximately six years after his original appointment, he first objected to the compensation paid him for the past six years and claimed that, notwithstanding he was appointed an inspector, class 2, at the understood compensation of \$4 per day, and notwithstanding that he had accepted the appointment as made and received the pay attached thereto for a period of six years, he had been wrongfully and erroneously paid and that he should have been paid during all that time at the rate of \$5 per day.

As well stated by the Court of Claims in this case (R. 21-22):

During all of this period he had received the compensation which we are justified in assuming he had expected to receive and all that he expected to receive when he was appointed; and having been paid each month as inspectors are regularly paid he had, so far as appears, at no time asserted any right to compensation other than that received by him. The Supreme Court has declared itself very emphatically with reference to the effect of such conduct on the part of a Government employee. There are so many manifest reasons why a Government employee should not be permitted for a long period of time to receive without protest the compensation which it may be assumed that he and his appointing officer both deemed him entitled to receive and afterwards assert a claim for a large amount of accrued compensation that it is not deemed necessary to discuss them here. We refer to the case of *United States v. Garlinger* (169 U. S. 316), at 322 and cases cited. ~~X~~

The decision of this court in *United States v. Garlinger* (169 U. S. 316, 322) is applicable to the facts in this case. In that case this court held:

It is not found that the claimant himself ever demanded, during the period of his service, the compensation he now seeks. What he complained of was that after he had performed an all-night service he was not excused from duty the follow-

To the same effect, see the following cases decided by this Court in Nov., 1921:

Norris v. United States.

duties to be performed and the compensation which he would receive. He accepted the compensation for a period of six years without protest. The compensation for the office held by appellant had not been fixed by statute and was left to the discretion of the Secretary of the Treasury. The Secretary exercised his discretion by fixing the compensation at \$4 per diem, and appellant accepted that compensation in full settlement of his services, not only at the time of his entrance into the service as inspector, but he evidenced his acceptance on every pay day when he received and receipted for his pay during the period for more than nine years during which he was employed as inspector, class 2. There being no statute clearly and absolutely fixing his compensation, his claim falls within the principle laid down by this court in *Chicago, Milwaukee and St. Paul Railway Company v. Clarke* (178 U. S. 353, 368-9), where the court said:

Without analyzing the cases, it should be added that it has been frequently ruled by this court that a receipt in full must be regarded as an acquittance in bar of any further demand in the absence of any allegation and evidence that it was given in ignorance of its purport, or in circumstances constituting duress, fraud, or mistake. (*De Arnaud v. United States*, 151 U. S. 483; *United States v. Garlinger*, 169 U. S. 316, 322; *United States v. Adams*, 7 Wall. 463; *United States v. Child*, 12 Wall. 232; *United States v. Justice*, 14 Wall. 535; *Baker v. Nacht-rieb*, 19 How. 126.)

CONCLUSION.

The compensation to be paid inspectors at the time of their entrance upon duty was within the discretion of the Secretary of the Treasury. He exercised that discretion and designated a compensation of \$4 per diem for inspectors of class 2. At no time during which appellant held the office of inspector, class 2, prior to the filing of his suit in the Court of Claims did he protest against the compensation paid him. A position of inspector, class 2, was tendered appellant and he accepted the same knowing the conditions attached thereto. He should not now be heard to repudiate his contract of employment or be allowed to maintain a suit for an additional compensation not fixed by the statute and not agreed to by the appointive power.

The judgment of the Court of Claims should be affirmed.

JAMES M. BECK,
Solicitor General.

ROBERT H. LOVETT,
Assistant Attorney General.

HARVEY B. COX,
Attorney.

OCTOBER, 1922.



No. 64

Supreme Court of the United States

October Term, 1922.

THOMAS F. E. RYAN,

Appellant,

vs.

THE UNITED STATES.

Appeal from the Court of Claims.

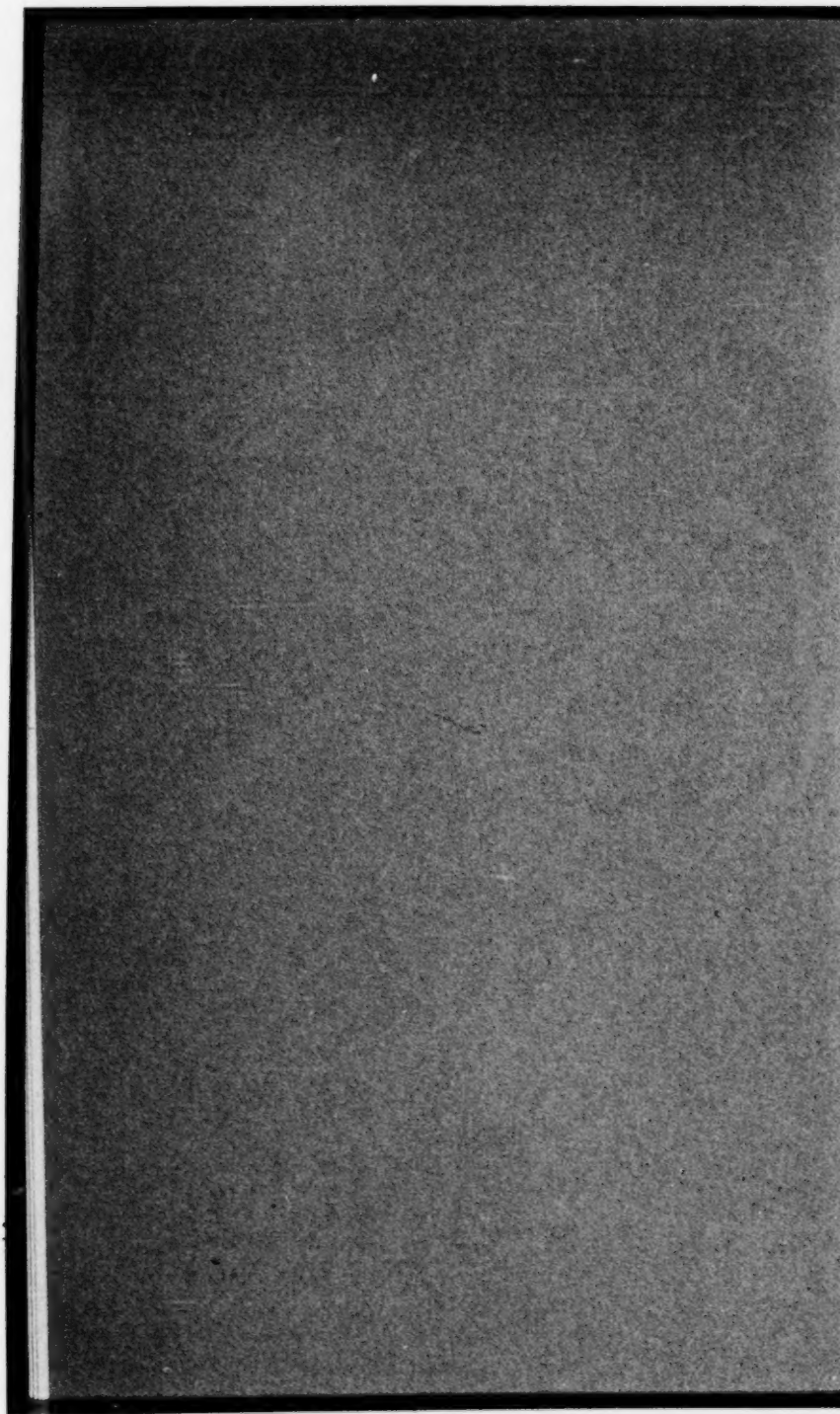
APPELLANT'S REPLY BRIEF.

WILLIAM E. RUSSELL,

LOUIS T. MICHENER,

PERRY G. MICHENER,

Attorneys for Appellant.



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IN THE
**Supreme Court of the United
States**

OCTOBER TERM, 1922.

No. 64.

THOMAS F. E. RYAN,
Appellant,

vs.

THE UNITED STATES.

} Appeal
from the
Court of
Claims.

REPLY BRIEF FOR THE APPELLANT.

I.

The brief of the appellee in this case, perhaps unintentionally, gives the impression that the claim is advanced by the appellant that the statutory salary of inspectors of customs throughout the United States is \$5 per diem, and that judgment for appellant herein will result in an award to all of the inspectors in all the ports. Such is not the fact or the contention, for the right of the appellant to succeed is based upon *special statutes applying to the Port of New York alone*. All of the salary legislation affecting inspectors, with the exception of the Port of New York, has been general in its scope. In the appendix hereto will be

found all of this legislation from 1789 to 1909, inclusive. It will be noted that the Acts of 1902, 1906 and 1907 affect inspectors at the Port of New York alone. It is upon these statutes, as construed by this court in the case of *Cochnowicz vs. United States*, 248 U. S. 405; 249 U. S. 588, that appellant's case rests. As stated in appellant's original brief, there are some eighty-five pending cases controlled by the decision of this case. All of them involve amounts smaller than the amount claimed by this appellant.

II.

(a) Counsel for the appellee (brief, at page 4) state:

"If a minimum salary of \$5 was provided by law for inspectors, Class 2, at the time of appellant's appointment, then it must be conceded that he is entitled to that compensation." Cases cited.

The question is not accurately stated. The real question for determination is whether or not there was a statutory salary of \$5 per diem in the Port of New York at the time of appellant's appointment.

(b) The Government counsel concede that, if there was such a statutory salary, appellant is entitled to that compensation under the doctrine of *United States vs. Andrews*, 240 U. S. 90; *Glavey vs. United States*, 182 U. S. 595. With the concession above set forth, and having in mind the decision of this Court in the *Glavey* case, *supra*, it is unnecessary to discuss appellee's argument as advanced in Point II, pages 23 to 29, concerning estoppel and waiver. Appellant's right to compensation is based upon the statute and not upon contract. The doctrine of estoppel cannot be invoked in salary claims based on a statute, for the excellent

reason that the control of salaries is vested in Congress, except when delegated, and when Congress has fixed a salary the appointing power may not set aside the will of the legislative body by requiring the appointee to accept something less than the statutory sum.

Counsel for the Government lay great stress upon the Deficiency Appropriation Act of March 3rd, 1881 (see pages 6 and 7 of their brief). This same statute was urged upon this Court in the *Cochnowicz* case (see page 6 of the brief for the United States in that case). Again, in the *Cochnowicz* case, when the United States petitioned for a rehearing, this Act of 1881 was vigorously urged upon this Court as being a justification for the reduction of the claimant to less than \$5 per diem (see pages 8, 9, 10, 11 and 12 of the petition of the United States for a rehearing in that case). But this Court did not so decide. Furthermore, this Statute of 1881 was discussed fully by counsel for Cochnowicz in the original brief (pages 17 and 18 of appellant's original brief).

The Government's argument in the instant case as to the effect of the Act of 1881 overlooks entirely the fact that the *later special* statutes of 1902, 1906 and 1907, applying to the Port of New York alone, limited and restricted the power of the Secretary of the Treasury with respect to the salary of the inspectors in that port. Such argument further overlooks the fact that the *Cochnowicz* case is decisive on that point. This Court no doubt had in mind that the Act of 1902 was entitled:

"An Act Regulating the Duties and *Fixing the Compensation of the Customs Inspectors at the Port of New York.*" (See appendix.) (Italics ours.)

It is not contended on behalf of the appellant that because all the other inspectors at New York were

receiving \$5 per diem he was thereby entitled to the same compensation. He was entitled to the same compensation because the statute so provided, *and for this reason alone.*

(c) The Act of 1909 was considered and construed by this Court in its decision of the *Cochnowar* case. This Court decided in that case that the power given by Section 2 of that act to the Secretary of the Treasury was to *increase and fix* the compensation of inspectors of customs not to exceed the sum of \$6 per diem. This Court further decided that the power of classification, as contended for by the Government, could be accommodated between the fixed salary of \$5 per diem and the authorized maximum of \$6 per diem. The appellant's contentions in the instant case are in harmony with and are based upon the decision in the *Cochnowar* case.

(d) On page 10 of appellee's brief some stress is laid upon the fact that Cochnowar was appointed at \$5 per diem in 1908 and was reduced to \$4 per diem in 1910, after passage of the Act of 1909, while Ryan was originally appointed inspector at \$4 per diem in 1910. Counsel for appellee concludes that this Court merely held in the *Cochnowar* case that the Secretary, having appointed Cochnowar at \$5, could not thereafter change his compensation. As stated in this appellant's original brief (pages 17 to 19), Cochnowar's right to recover rested solely upon the ground that he held an office to which the law affixed a salary of \$5 per diem. If the law authorized a salary less than \$5 per diem in the Port of New York, Cochnowar could have been reduced to that lower salary, because the courts will not interfere with the exercise of the discretionary power over its personnel vested by law in the executive departments. *Keim vs. United*

States, 177 U. S. 290. If the law did not authorize a salary lower than \$5 per diem in the Port of New York, the appellant in the instant case is entitled to recover, and it is submitted that this question has been foreclosed by the *Cochnowar* case.

(e) On page 12 of appellee's brief, it is contended that if Ryan's claim should be allowed, the same theory would be advanced by other employees of the Government service. This argument is again based upon the assumption that Ryan's claim to increased compensation is predicated upon payment of said increased compensation to other employees. His claim is based on a statute and, if there be other employees who are not receiving the salary that Congress has provided for them, it is clear that they would be entitled to recover the lawful salary under the decisions of this court.

III.

On page 24 of appellee's brief, it is argued that the long continued contemporaneous construction of a statute by the department charged with its execution will be given great weight and unless obviously erroneous will not be disturbed by the courts. This is unquestionably the rule when considering ambiguous statutes. In fact, this argument was urged upon this Court by counsel for *Cochnowar* (see pages 35 and 36 of appellant's brief in the *Cochnowar* case). It will be observed from an examination of the statutes affecting inspectors' salaries, set forth in the appendix hereto, that permissive language was used in all of the statutes except R. S., Sec. 2733, and that an authorized maximum was named in each of them. As it appeared in the *Cochnowar* case, the Secretary of the Treasury had always construed such statutes as intending an in-

crease to the maximum amount, and had governed himself accordingly. The findings in the instant case (finding IV, R. 7), show that all of the inspectors in the Port of New York were increased to \$4 per diem pursuant to the authority conferred by the permissive Act of June 6, 1864, and to \$5 per diem (finding VI, R. 9), pursuant to the Act of December 16, 1902. It appears further, in the finding last mentioned, that all of the inspectors at the Port of New York continued to receive \$5 per diem until the appointment of the appellant herein on April 16, 1910. It thus appears that from 1789 to 1910, the Secretary of the Treasury had never construed the salary statutes as authorizing any classification in any port, and that he had always construed these permissive statutes as intending an increase to the maximum therein named. In the *Cochmower* case, the claim was advanced by the Government that the right to "classify" at \$4 per diem at the Port of New York rested upon the provisions of the Act of March 4, 1909. This contention was brushed aside by this Court. Therefore, if great weight is to be given to the long continued contemporaneous construction of all of these related statutes by the department charged with the execution thereof, at New York was fixed in 1902 at \$5 per diem, when all of them were increased to that amount and without reference to the later Acts of 1906 and 1907. However, these Acts of 1906 and 1907 make conclusive that which might have been doubtful prior thereto.

In considering these salary statutes it may be well to refer briefly to the statutory rule of legislative interpretation of previous statutes in *pari materia*. The rule was well stated in the early case of *Alexander vs. Mayor*, 5 Cranch 1. The opinion in that case was

written by Mr. Chief Justice Marshall. At pages 7 and 8 the rule was stated in the following language:

"Without deciding this question, as depending merely on the original law, it is to be observed that acts in *pari materia* are to be construed together as forming one act. If in a subsequent clause of the same act provisions are introduced which show the sense in which the Legislature employed doubtful phrases previously used, that sense is to be adopted in construing those phrases. Consequently, if a subsequent act on the same subject affords complete demonstration of the legislative sense of its own language, the rule which has been stated, requiring that the subsequent should be incorporated into the foregoing act, is a direction to courts in expounding the provisions of the law."

Applying this rule to the Acts of 1906 and 1907, it would seem that Congress declared, in unequivocal language, that the Act of 1902, which was entitled, as heretofore stated:

"An Act Regulating the Duties and Fixing the Compensation of the Customs Inspectors at the Port of New York."

intended an increase of the salary to \$5 per diem for all inspectors of customs at the Port of New York. We are reinforced in this belief by the fact that Congress appropriated sufficient moneys for each of the years succeeding 1902 to carry into effect the act passed that year.

IV.

(a) On page 25 of appellee's brief, there is a quotation from *MacMath vs. United States*, 248 U. S. 151. MacMath was a clerk to the Collector of Customs, which means that he was an employee only and not an

officer with a fixed statutory compensation. While such clerk, he was appointed as "Clerk and Acting United States Weigher." A United States weigher in *an officer*, as this Court held. The action was for the statutory salary of such officer, \$2,500 per annum, and this Court held that the department had the right to so designate the duties of a clerk and make him perform the duties of weigher, and, further, that there was no intention to appoint MacMath as a weigher, and it therefore denied his claim for the statutory salary. In the instant case there was no question about the appointment of Ryan to the office of inspector of customs. In the *MacMath* case, in the opening paragraph of the opinion, the Court said:

"When an office with a fixed salary has been created by statute, and a person duly appointed to it has qualified and entered upon the discharge of his duties, he is entitled, during his incumbency, to be paid the salary prescribed by statute; and effect will not be given to any attempt to deprive him of the right thereto, whether it be by unauthorized agreement, by condition, or otherwise. *United States vs. Andrews*, 240 U. S. 90; *Glavey vs. United States*, 182 U. S. 595."

The foregoing language takes out of the present case all features of the law of estoppel, whether they be by acquiescence, agreement, waiver, or what not. It would, therefore, seem clear that the *MacMath* case does not support the appellee's contention.

(b) Of the cases cited on page 28 of appellee's brief, it is to be noted that all of these actions were based on contracts, express or implied, and they are therefore not controlling in the case at bar, which is predicated solely on a statutory right to a salary. The distinction is as plain as a pike-staff.

V.

(a) On page 21 of appellee's brief, it is urged upon the Court:

"Even if it should be held by this Court that appellant is entitled to the difference between \$4 per day, which he received, and the \$5 per day which he claims, the additional compensation cannot be allowed him subsequent to June 30, 1913, when the reorganization of the customs service authorized by the Act of 1912, became effective, as that act impliedly repealed all former acts." * * *

We have discussed the effect of the Act of August 24, 1912, and the executive order of March 3, 1913, issued pursuant thereto, somewhat briefly in our original brief (pp. 41-42). In view of the fact that the appellee urges that this Court decided that the executive order of 1913, limited Cochnower's recovery to the period ending June 30, 1913, it is deemed necessary to discuss said executive order more fully, for counsel for the appellant do not find anything in the *Cochnower* decision that construes the executive order in the manner claimed. It is true that Cochnower's claim was limited to the period ending June 30, 1913, but the opinion does not disclose the reason therefor.

(b) The executive order of March 3, 1913, was issued pursuant to the Act of August 24, 1912, C. 355, 37 Stats. 434. The Act of August 24, 1912, begins as follows:

"The President is authorized to reorganize the customs service and cause *estimates* to be submitted therefor on account of the fiscal year, 1914, bringing the total cost of said service for said fiscal year within a sum not exceeding \$10,150,000, etc." (Italics ours.)

The President, pursuant to such authorization, submitted both the plan of reorganization and the estimate for the fiscal year, 1914 (see U. S. Compiled Stats. 1913, Section 5327).

It will be noted that he was to reorganize the customs service and to *cause estimates to be submitted* for the fiscal year, 1914. It is clear that the President was to do all this by and through the Secretary of the Treasury and the officials of that department, they being skilled in all things relating to the subject, and it is equally clear that he was to cause estimates to be submitted for the fiscal year, 1914 *only*. The estimates *were to be for one fiscal year and no more*, while the Act declared that the reorganization, when communicated, should be the "*permanent organization of the customs service*" until otherwise provided by Congress. In other words, the reorganization was to stand "*until otherwise provided by Congress*," while the estimate was advisory and temporary, nothing more. As the Act directed that the "reorganization shall be communicated to Congress," it was easy and natural that the "estimate," should be sent with it and that is why it was "attached," to the order. It must be remembered that the Act limited the expense of collecting the revenue from customs to \$10,150,000, while the estimate called for a sum greatly in excess of this amount.

(c) Finding VIII, R. 11, shows clearly that the Treasury Department, has at all times since the said executive order, became effective, construed the estimate annexed to the reorganization plan as an estimate only, and in no sense a restriction, limitation or denial of the right of the secretary to increase or diminish the numbers of the various positions therein provided for, or to increase or decrease, by promotion or demotion, the compensation within statutory limita-

tions of any of the officers therein mentioned. It is apparent, therefore, that the department has never regarded that the estimate annexed to the executive order, and which set forth that there were certain inspectors employed at New York at \$4 per diem, was controlling upon the secretary in any way. In fact, the language at the conclusion of the executive order shows quite clearly that the estimate was intended to be an estimate only. "Attached hereto is a detailed estimate of the expenses of the customs service under the reorganization above provided." It was well understood by the department and by Congress that it would not be possible in the customs service to legislate definitely as to each and every position, and as to the salary to be paid to the incumbents thereof. Most of the *officers* in the customs service receive compensation regulated by statute, while the *clerks' and employees'* salaries are left to the discretion of the Secretary of the Treasury. Reference to the official registers of the employees of the Treasury Department will show that innumerable employees have been reduced in salary below the amounts named in the estimate annexed to the executive order, that numerous positions mentioned in said estimate have been abolished, and others created, and that salaries generally have been increased over and above the amount named in said estimate.

(d) Not only has the Secretary of the Treasury construed and dealt with the estimate as an estimate only, but Congress has dealt with the same in a similar manner. It will be remembered that the Act of August 24, 1912, *supra*, authorized the reorganization of the customs service so as to bring the cost within a sum not exceeding \$10,150,000, for the fiscal year ending, 1914. The estimate annexed to the order contemplated appropriations of \$10,381,766.01. As a matter

of fact, Congress appropriated for the fiscal year, ending 1914, \$10,566,000, see

Act of June 23, 1913, Chapter 3, 38 Stats. 23 (Sundry Civil).

Act of July 29, 1914, C. 215, 38 Stats. 565 (Deficiency Act).

For the fiscal year, ending 1915, the sum of \$10,515,000, was appropriated; see

Act of August 1, 1914, C. 223, 38 Stats. 623 (Sundry Civil).

For the fiscal year, 1916, the sum of \$10,180,000, was appropriated; see

Act of March 3, 1915, C. 75, 38 Stats. 836 (Sundry Civil).

For the fiscal year, 1917, the sum of \$10,097,500, was appropriated; see

Act of July 1, 1916, C. 209, 39 Stats. 84, 277, 278.

For the fiscal year, 1918, the sum of \$10,255,000, was appropriated; see

Act of June 12, 1917, C. 27, 40 Stats. 120, and the

Act of March 28, 1918, C. 28, 40 Stats. 468.

For the fiscal year, ending 1919, the sum of \$10,537,000, was appropriated; see

Act of July 1, 1918, C. 113, 40 Stats. 644.

For the fiscal year, ending 1920, the sum of \$10,175,000, was appropriated; see

Act of July 19, 1919, C. 24, 41 Stats. 174 (Sundry Civil), and

Act of June 5, 1920, C. 253, 41 Stats. 1023 (Deficiency Act).

For the fiscal year, ending 1921, the sum of \$11,457,000, was appropriated; see

Act of June 5, 1920, C. 235, 41 Stats. 883 (Sundry Civil).

For the fiscal year, ending 1922, the sum of \$11,435,000, was appropriated; see

Act of March 4, 1921, C. 161, 41 Stats. 1376 (Sundry Civil).

It is clear, therefore, that Congress has always dealt with the said estimate as being an *estimate* only and has ratified, and confirmed the construction placed thereon by the Secretary of the Treasury, as it appears by the findings in this case. Congress has since appropriated both larger and smaller sums of money than the limitational amount specified in the Act of August 24, 1912. It has also accepted from the Secretary of the Treasury, in each year succeeding the fiscal year, 1914, estimates totally at variance with the estimate annexed to the executive order.

The Court below held in *Lynch's Administrator vs. the United States*, 31 Ct. Cls. 62, that such acceptance by Congress amounts to an adoption of the construction. In that case the question before the Court was the effect to be given to reports that had been made to Congress from time to time and which had been acted upon by that body. At the top of page 65, the Court says:

"These reports have been acted upon by Congress, thereby adopting the construction of the statute circumscribing the loyalty required to be found to the person furnishing the supplies or the person from whom they were taken."

In the case at bar, the only way that Congress could act upon the reports or estimates of the Secretary of

the Treasury was by making appropriations. Congress has acted upon these various reports or estimates, and in such manner as to leave no doubt but that it adopted and acquiesced in the stand taken by the secretary in treating the estimate annexed to the executive order as being an estimate only and in no sense a part of said executive order and in nowise fixing the permanent organization of the custom service.

(e) The acts and constructions of the secretary were upon the theory that the "estimate," was not, and was not intended to be a part of the executive order, and his annual reports to Congress showed that same was not held and regarded by the department as a part of that order. Congress found no fault and did not challenge the department's acts or views or constructions in any manner, but acquiesced in them. It would pass the bounds of possibility to believe that Congress was not well informed as to the construction placed upon the "estimate," by the department.

"It is presumed that the Legislature is familiar with the law and the construction placed upon it."

Sutherland Statutory Construction, Volume 2,
page 499.
Board v. Holliday, 150 Ind. 216.

(f) The Act of August 24, 1912, authorized the President to reorganize the customs service and cause estimates to be submitted, "Such reorganization to be communicated to Congress," etc. The authority was broad and comprehensive, and the reorganization was to be the "permanent organization of the customs service" till otherwise provided by Congress. The whole subject of this reorganization of the customs service was put in the power of the President, and the reorganization made by him was to continue in force "until otherwise provided by Congress."

Inevitably, the application and operation of the permanent reorganization was a subject to be dealt with day by day in administering the customs service, and manifestly that had to be done by the Secretary of the Treasury.

(g) The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. Hence, the acts and decisions set forth in Finding VIII, R. 11, were, in legal contemplation, the acts of the President himself. This is the doctrine of *Wilcox vs. Jackson*, 13 Peters 498, 513; *United States vs. Farden*, 99 U. S. 10, 19; *Wolsey vs. Chapman*, 101 U. S. 755, 769, 770 and many other cases.

In the case last cited, page 770, it was held that

"An order sent out from the appropriate executive department in the regular course of business is the legal equivalent of the President's own order to the same effect."

It seems quite clear that the Secretary of the Treasury, in dealing with the problem of reorganizing the

customs service, and in preparing the executive order issued under date of March 3, 1913, has acted in accordance with the intent of Congress and entirely in a common sense way. The desire of Congress, as manifested in the act was to consolidate the great number of customs collection districts into a fewer number in order that more efficient administration could be obtained. There were over a hundred customs collection districts at that time, and the expense of maintaining some of these districts was out of all proportion to the revenue derived therefrom. In fact, in many of these districts thousands of dollars were expended in office rent, salaries, etc., to collect a few dollars of revenue. With this thing in mind, the Secretary of the Treasury, by means of the executive order, arranged to abolish certain collection districts, ports and sub-ports, and consolidate same into other collection districts, ports and sub-ports. In order to do this effectively and to provide for better administration, he extended the provisions of the "Immediate Transportation Act"; he abolished all fees theretofore paid to collectors of customs; he provided principal offices as headquarters for the respective new districts created, some forty-nine in number; he empowered surveyors to act where there were no collectors; he abolished the offices of surveyors of customs except at certain large ports; he appointed deputy collectors at various ports of entry; he provided for blank forms of various kinds to be used in connection with the importation of merchandise and delivery thereof from customs' custody; he continued in the classified service on a waiting list various officers whose positions were abolished, and he provided for the usual protests theretofore authorized by law. He also

fixed the salaries of the various collectors of customs in the forty-nine new districts created.

He did not, in anywise, attempt to fix in the executive order *any salaries other than those of collectors.* It is significant that the order provides only for the fixing of collectors' salaries and does not refer to, in any way, the salaries of other officers and employees of the customs. Most of these subordinate officers' and employees' salaries are subject to change by the secretary at will, but some of them are fixed by law and always have been.

With the foregoing in mind, the conclusion is irresistible that the proper interpretation and treatment of the executive order of 1913 is that the order is valid in all respects, and that the provisions thereof are in full force and effect at the present time, and have been in full force and effect since July 1, 1913, but that the matters dealt with in the estimate annexed thereto were treated and are to be treated as items subject to change at the discretion of the secretary except where he may be limited by law to the contrary. It follows, then, that the executive order does not limit the appellant's claim to three years.

We submit that the judgment of the Court of Claims should be reversed and that the appellant should have judgment for the amount prayed for in his petition, namely, \$3,465.00.

Respectfully submitted,

WM. E. RUSSELL,

LOUIS T. MICHENER,

PERRY G. MICHENER,

Attorneys for Appellant.

(a)

APPENDIX.

For the purpose of placing before the court the complete legislation affecting the salaries of inspectors of customs, appellant submits herewith all of such statutes in full in the order of enactment.

Act of July 31, 1789, C. 5, Section 29 (1 Stats. 45) entitled:

"An Act Relative to the *Compensation* and Duties of Certain Officers Employed in the Collection of Impost and Tonnage. (In part as follows):

"To each inspector there shall be allowed for every day he shall be actually employed in aid of the customs, a sum *not exceeding* one dollar and twenty-five cents, etc." (Italics ours.)

Act of March 3, 1797, C. 9, Section 3 (1 Stats. 503) entitled:

"An Act to Regulate the Collection of the Duties Imposed by Law on the Tonnage of Ships or Vessels and on Goods, Wares and Merchandise Imported into the United States. In part as follows:

"That from and after the last day of March, in the present year, *in lieu of the sum heretofore established by law*, there shall be paid to each inspector, for every day he shall be employed in aid of the Customs, a sum *not exceeding* two dollars; etc." (Italics ours.)

Act of March 2, 1799, C. 23, Section 2 (1 Stats. 707) entitled:

"An Act to *Establish* the Compensation of the Officers Employed in the Collection of the Duties on Impost and Tonnage, and for other Purposes. (Italics ours.) In part as follows:

"To each inspector there shall be allowed for every day he shall be actually employed in aid

(b)

of the customs, a sum *not exceeding two dollars, etc.*" (Italics ours.)

Act of April 26, 1816, C. 95, (3 Stats. 306) entitled:

"An Act to Increase the Compensation Now Allowed by Law to Inspectors, Measurers, Weighers and Gaugers Employed in the Collection of the Customs. (Italics ours.) In part as follows:

"That an addition of fifty (50%) per cent upon the sums allowed as compensation to inspectors, or persons acting as occasional inspectors, employed in aid of the customs, and to the measurers, weighers or gaugers, by the act, entitled * * * be, and the same is hereby allowed, etc." (Italics ours.)

Revised Statutes, Section 2733:

"Each inspector shall receive for every day he shall actually be employed in aid of the customs, three dollars; and for every other person that the collector may find it necessary and expedient to employ as occasional inspector, or in any other way in aid of the revenue, a like sum, while actually so employed, not exceeding three dollars for every day so employed."

Section 2733, Revised Statutes, is based upon the Acts of 1799 and 1816 (*supra*).

Act of April 29, 1864, C. 71 (13 Stats. 61) entitled:

"An Act to Increase the Compensation of Inspectors of Customs in Certain Ports. (Italics ours.)

"That the Secretary of the Treasury be, and he hereby is, authorized to increase the compensation of inspectors of customs in such ports as he may think it advisable so to do, and may designate, by adding to the present compensation of said officers a sum *not exceeding one dollar per day*. But the increase hereby authorized

(c)

shall not extend beyond July 1st, 1865."
(Italics ours.)

Act of March 2, 1865, C. 73, Section 5 (13 Stats. 460) as follows:

"And be it further enacted, that the provisions of the act approved April 29, 1864, *increasing the compensation of inspectors of customs in certain ports*, be extended to July 1st, 1866." (Italics ours.)

Act of July 23, 1866, C. 208, Section 9 (14 Stats. 208) as follows:

"And be it further enacted, that the provisions of the Act approved April 29, 1864, *increasing the compensation of inspectors of customs in certain ports* is hereby continued in force." (Italics ours.)

Revised Statutes, Section 2737, as follows:

"The Secretary of the Treasury may increase the compensation of inspectors of customs in *such ports as he may think it advisable* so to do, and may *designate*, by adding to the present compensation of such officers, a sum *not exceeding one dollar per day*." (Italics ours.)

This Section 2737 of the Revised Statutes is based upon the Acts of 1864 and 1866 (*supra*).

Act of March 3, 1881, C. 132 (21 Stats. 429), The Deficiencies Act. In part as follows:

"For expenses of collecting the revenue from customs for 1878 and prior years, to pay claim numbered 81703, three dollars and fifty-four cents. Provided, that hereafter the Secretary of the Treasury *may appoint* inspectors of customs at a compensation less than three dollars per day, when, in his judgment, the public service will permit." (Italics ours.)

(d)

Act of December 16, 1902, C. 2 (32 Stats. 753)
entitled:

"An Act Regulating the Duties and *Fixing the Compensation* of the Customs Inspectors at the Port of New York." (Italics ours.)

"That the Secretary of the Treasury is hereby authorized *to increase* the compensation of inspectors of customs at the Port of New York, as he *may think advisable and proper*, by adding to their *present* compensation a sum *not exceeding* one dollar per day, which additional compensation shall be for work now performed by them at unusual hours, for which no compensation is now allowed, and shall include work performed by said inspectors at night in examining passengers' baggage, and also as reimbursement for expenses incurred by them for meals and transportation while in the discharge or performance of their official duties." (Italics ours.)

Act of June 30, 1906, C. 3912 (34 Stats. 636),
Deficiencies Appropriation Act. In part as follows:

"To pay the inspectors of customs of the *Port of New York* the *difference between* the per diem salary of four dollars paid them during the months of October, November and December, 1905, and their *proper per diem salary for the same period (five dollars per diem)* in accordance with the *Act of Congress approved December 16, 1902*, thirty-one thousand dollars, or so much thereof as may be necessary." (Italics ours.)

Act of March 4, 1907, C. 2919 (34 Stats. 1373)
Deficiencies Appropriation Act, in part as follows:

"To enable the Secretary of the Treasury to pay certain inspectors of customs of the *Port of New York* the difference between the per diem salary of four dollars paid them during

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the months of October, November and December, 1905, and their *proper per diem salary of five dollars* for the same period, nine hundred forty dollars." (Italics ours.)

Act of March 4, 1909, C. 314, Section 2 (35 Stats. 1065) entitled:

"An Act *Fixing* the Compensation of Certain Officials in the Customs Service and for other Purposes." (Italics ours.)

"That the Secretary of the Treasury be, and he is hereby authorized to *increase and fix* the compensation of inspectors of customs, *as he may think advisable, not to exceed* in any case the rate of six dollars per diem, and in all cases where the maximum compensation is paid no allowance shall be made for meals or other expenses incurred by inspectors when required to work at unusual hours." (Italics ours.)

RYAN v. UNITED STATES.**APPEAL FROM THE COURT OF CLAIMS.**

No. 64. Argued October 16, 1922.—Decided November 13, 1922.

1. Under §§ 2733 and 2737, Rev. Stats., and the Act of March 3, 1881, c. 132, 21 Stat. 429, the Secretary of the Treasury was authorized to appoint inspectors of customs, at New York, at \$4.00 per day. P. 91.
 2. The Act of December 16, 1902, c. 2, 32 Stat. 753, authorized the Secretary to increase the per diem of such inspectors \$1.00 but did not require it; nor did the appropriation acts of June 30, 1906, c. 3912, 34 Stat. 636, and March 4, 1907, c. 2919, *id.* 1373, make such increase mandatory. P. 92.
- 56 Ct. Clms. 103, affirmed.

APPEAL from a judgment of the Court of Claims rejecting a claim for additional pay as a customs inspector.

Mr. William E. Russell, with whom *Mr. Louis T. Michener* and *Mr. Perry G. Michener* were on the briefs, for appellant.

Mr. Assistant Attorney General Lovett, with whom *Mr. Solicitor General Beck* and *Mr. Harvey B. Cox* were on the brief, for the United States.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

Ryan, the claimant and appellant, by his amended petition in the Court of Claims, sought to recover from the United States \$3,465, being \$1.00 per diem from April 16, 1910, to and including October 10, 1919. He was during that period a customs inspector at New York, and received \$4.00 per day. He says that by law he was entitled to \$5.00 per day, and he brings suit to recover the difference. The Court of Claims gave judgment for the Government. The question for our decision is what was

Ryan's lawful compensation during this period of nine and a half years.

Ryan entered the customs service as a probationary junior clerk, Class C, in 1899, after passing a civil service examination. He was promoted from one place to another in the service until as the result of a promotion examination he became inspector, Class 2, at \$4.00 a day, and executed an oath as such on April 18, 1910. This appointment was made in pursuance of authority granted by the Secretary of the Treasury to the Collector at New York to appoint three inspectors of customs at \$4.00 a day, Class 2. By the same authority 22 more inspectors of the same class were appointed before July 1, 1910. On that day, the Collector at New York, with the approval of the Secretary, effected a reorganization by which 74 inspectors were appointed to Class 2, at \$4.00 a day—296 to Class 4 at \$5.00 per day, and 52 to Class 5, at \$6.00 per day. The appointment of the claimant and others in April, 1910, as inspectors of Class 2, \$4.00 per day, marked their entrance into the service, and they were not reappointed under the reorganization but remained as inspectors of Class 2 under their original appointments.

Was this appointment of Ryan at \$4.00 a day authorized by law? Section 2733, Rev. Stats., provides that each inspector of customs shall receive for every day he shall be actually employed in aid of customs, \$3.00. Section 2737 provides that the Secretary of the Treasury may increase the compensation of inspectors of customs in such ports as he may think it advisable so to do, and may designate, by adding to the present compensation of such officers, a sum not exceeding \$1.00 a day. By Act of March 3, 1881, c. 132, 21 Stat. 429, the Secretary was given authority to appoint inspectors of customs at a compensation less than \$3.00 per day when in his judgment the public service would permit. There is certainly nothing in the foregoing provisions, still in force, which prevented

the Secretary from appointing inspectors in New York at \$4.00 a day. By virtue of this authority, before 1902, he had increased the pay of all inspectors at New York to \$4.00.

By Act of December 16, 1902, c. 2, 32 Stat. 753, the Secretary was authorized to increase the compensation of inspectors of customs at the port of New York as he might think advisable and proper by adding to their then compensation a sum not exceeding \$1.00 per day, such additional compensation to be for work performed at unusual hours for which no compensation was then allowed, and as reimbursement of expenses for meals and transportation while in the performance of official duties. Under the foregoing, in 1903, the Secretary increased the pay of inspectors then in office in New York to \$5.00 per day, Class 4. The Act of 1902 is wholly permissive in its language. It does not require an increase of \$1.00 a day or any part of it to inspectors in New York. It only authorizes it.

It is contended, however, that the Act of 1902 has been construed by Congress in two deficiency appropriation acts to be mandatory and to require that all inspectors appointed in New York shall receive \$5.00 a day. The acts relied on are that of June 30, 1906, c. 3912, 34 Stat. 634, 635, and that of March 4, 1907, c. 2219, 34 Stat. 1371, 1373. In substantially the same language they appropriated money to pay inspectors of the port of New York "the difference between the per diem salary of four dollars paid them during the months of October, November, and December, nineteen hundred and five, and their proper per diem salary for the same period (five dollars per diem), in accordance with the Act of Congress approved December sixteenth, nineteen hundred and two." These deficiency appropriations related to 331 inspectors at New York whose pay had been fixed at \$5.00 a day under the Act of 1902, prior to October 1, 1905, and which on that

10 Opinion of the Court.

date was reduced by the Secretary of the Treasury to \$4.00. On January 1, 1906, their pay was increased again to \$5.00.

It would be straining provisions of a deficiency act applying to special instances to hold that it was intended to change a plainly permissive statute into a mandatory one. The much more natural interpretation of the language used is that Congress thought that the pay of these inspectors which had been increased to \$5.00 a day under the Act of 1902 by the Secretary, had thus become fixed by law and so that the Secretary had no power to reduce them. This fully satisfies the words relied on without amending the statute or making it mean what it plainly does not mean.

Counsel for appellant press upon the Court, also, its decision in *Cochner v. United States*, 248 U. S. 405, as a basis for recovery here. In that case, the claimant, a customs inspector in New York, had been, with all his fellows, advanced to \$5.00 a day (Class 4), under the Act of 1902. The Secretary had, thereafter, reduced him and his fellows to \$4.00 a day (Class 2), and counsel for the Government asserted authority to do this under the Act of March 4, 1909, c. 314, 35 Stat. 1065, by which the Secretary was empowered to "increase and fix the compensation of inspectors of customs, as he may think advisable, not to exceed in any case the rate of six dollars per diem." The Court held that authority to increase did not give authority to decrease, and that as the pay of the inspectors in that case had been fixed at \$5.00, it was the legal pay and they could recover the balance due. The Court took the same view which before the Act of 1909 Congress seemed to have taken in the deficiency acts we have just discussed. Neither the language of Congress in the deficiency acts nor the *Cochner Case* has any application to the one before us, because here the claimant entered the service as a new appointee at \$4.00 a day

Counsel for the United States.

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(Class 2), which, as we have seen, the Secretary had full authority to fix, and his pay was not increased during the period for which he seeks recovery.

This conclusion makes it unnecessary for us to consider any other question in the record.

Affirmed.

UNITED STATES v. BOWMAN.